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## Case Western Reserve Law Review

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Volume 29 | Issue 1

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1978

# Expanding Condominiums in Ohio

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### Recommended Citation

John S. Inglis, *Expanding Condominiums in Ohio*, 29 Case W. Res. L. Rev. 228 (1978)

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# Notes

## EXPANDING CONDOMINIUMS IN OHIO

*As originally drafted, the Ohio Condominium Property Act contemplated the total completion of a condominium development before the conveyance of units. Thus, a developer was theoretically disabled from constructing a condominium in "phases" to allow for test marketing of the project and use of the proceeds from initial sales to finance future development. Recent amendments to the Ohio Act permit the construction of expandable condominiums. After examining certain approaches designed to circumvent the original statute's constraints on progressive construction of condominiums, the author assesses the changes made by the recent legislation, highlights its several ambiguities, and considers the new law in light of its ability to balance the interests between developer and purchaser.*

### INTRODUCTION

CONDOMINIUM<sup>1</sup> OWNERSHIP IS UNIQUE in that it involves the simultaneous enjoyment of two distinct property interests: a fee or leasehold interest<sup>2</sup> in individual spacial units<sup>3</sup> in a

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1. Essentially, condominium means:

to have control (*dominium*) over a certain property jointly with (*con*) one or more other persons . . . . The "condominium" or co-ownership aspect directly concerns only a part of the owner's complete bundle of property rights, but the particular form of packaging or combination of these rights has come to be known in its entirety as a condominium.

D. CLURMAN & E. HEBARD, CONDOMINIUMS AND COOPERATIVES 2 (1970).

The condominium should not be confused with the cooperative apartment. In the latter form of ownership, the tenant-owner holds a lease to particular space in the building as well as an equitable interest in the corporation or trust that holds title to the building and land of the cooperative. Legislative authorization for such cooperative ownership has not been necessary. Cribbet, *Condominium—Home Ownership for Megalopolis?*, 61 MICH. L. REV. 1207, 1216-17 (1963).

2. Under the Ohio Condominium Property Act, any property declared condominium property by the owner must be either a fee simple estate or a 99-year leasehold, renewable forever. OHIO REV. CODE ANN. § 5311.02 (Page Supp. 1978).

3. "Unit" is defined in the Ohio Condominium Property Act as: "a part of the condominium property consisting of one or more rooms on one or more floors of a building and designated as a unit in the declaration and delineated on the drawings . . . ." OHIO REV. CODE ANN. § 5311.01(I) (Page Supp. 1978).

Unless otherwise provided in the declaration or drawings, the boundaries of a unit are the interior surfaces of its perimeter walls, floors, and ceilings. Windows and doors in the perimeter walls, floors, or ceilings of a unit are part of the unit. Supporting walls, fixtures, and other parts of the building that are within the boundaries of a unit but which are necessary for the existence, support, maintenance, safety, or comfort of any other part of the condominium property are not part of the unit.

*Id.* § 5311.03(D).

There has been some debate as to the exact nature of an owner's interest in his individ-

multi-unit project, and a cotenancy in an undivided proportionate interest in common areas such as the underlying land, structural elements, and recreational facilities. The appeal of the condominium encompasses economic and psychological factors. While the condominium owner enjoys the tax benefits of individual home ownership,<sup>4</sup> he obtains the further economic advantage of purchasing the unit at a sale price generally lower than the price of conventional housing with comparable interior dimensions.<sup>5</sup> Moreover, there are psychological considerations relating to permanence of location and the security of fee simple ownership,<sup>6</sup> coupled with the opportunity to enjoy recreational and other facilities otherwise unavailable to the average homeowner.

At present, condominiums account for an estimated twenty-five percent of all new housing starts each year.<sup>7</sup> The Department of Housing and Urban Development has estimated that thirteen percent of the total number of condominiums are located in the Midwest.<sup>8</sup> These statistics place Ohio eleventh in the total number of condominiums in existence<sup>9</sup> and third in terms of recent activity.<sup>10</sup> The rapid growth of the condominium in Ohio is evidenced by the fact that between 1972 and 1976 the number of condominium recordings in Cuyahoga County doubled that for the preceding ten years,<sup>11</sup> in the Columbus area, the number of

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ual unit. The crux of of this debate is whether the unit is merely a part of a building or whether it encompasses an interest in airspace which survives the destruction of the building. See Kerr, *Condominium—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 25-27 (1963). Under the latter theory, "it could be argued that upon reconstruction of individual units within this space previously occupied by units, title to the tangible portions of the building would vest in the owner of the airspace by virtue of the doctrine of accession." Smith, *Hybrid Housing in Ohio: Condominium*, 15 W. RES. L. REV. 597, 610-11 (1964).

4. Real estate taxes and interest on mortgage indebtedness are tax deductible to a unit owner, while they are merely components of rent to the residential tenant. I.R.C. §§ 163 and 164 were made expressly applicable to condominium owners in 1964. Rev. Rul. 64-31, 1964-1 C.B. 300. The income on the invested equity of the owner of a unit which he receives in the form of the use of real estate is not subject to tax as imputed income. The unit owner may avail himself of the tax deferral of nonrecognition of capital gain upon sale under I.R.C. § 1034 and would be entitled to deductions for depreciation and rental expenses under I.R.C. §§ 167 and 212 should he decide to rent his unit. The unit owner is also in a position to recover increased equity in his unit due to inflation. See Kerr, *supra* note 3, at 11, 15-17, 39-40.

5. Smith, *supra* note 3, at 622.

6. Kerr, *supra* note 3, at 12.

7. See I HUD CONDOMINIUM/COOPERATIVE STUDY I-7 (1975).

8. *Id.* at III-2.

9. *Id.* at III-16.

10. *Id.* at III-17.

11. For a complete list of condominium recordings in Cuyahoga County, see The

condominium units increased from 500 in 1970 to 4,600 in 1975.<sup>12</sup>

Legislative sanction was given to condominium development in Ohio in 1963 through the enactment of chapter 5311 of the Ohio Revised Code.<sup>13</sup> As originally drafted, the statutory scheme contemplated the total completion of a condominium development before the conveyance of any units. This constraint was created essentially by the requirements that certified drawings depicting "the building or buildings as constructed" be filed with the condominium declaration and bylaws,<sup>14</sup> and that "[n]o interest in a unit . . . be conveyed until the declaration, bylaws, and drawings . . . have been filed for record."<sup>15</sup> In accordance with this view of a condominium as a fixed number of units in a single predetermined project was the further requirement that the percentage interest in the common areas be determined by a formula

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Cleveland Press, April 29, 1978, § C (Home Magazine), at 4; *id.*, Jan. 15, 1977, § C (Home Magazine), at 10.

12. I HUD CONDOMINIUM/COOPERATIVE STUDY IV-1 (1975). *See generally* II HUD CONDOMINIUM/COOPERATIVE STUDY app. A (1975).

13. OHIO REV. CODE ANN. §§ 5311.01-.22 (Page 1970). The provisions of the Ohio statute were synopsized in law review commentary shortly after its enactment. *See Kreider, The Ohio Condominium Act*, 33 U. CIN. L. REV. 463 (1964); Smith, *supra* note 3, at 605-21.

It is generally recognized that a condominium may exist at common law. *See* I A. FERRER & K. STECHER, LAW OF CONDOMINIUM § 53 (1967). However, implementing legislation has been deemed necessary in most common law jurisdictions to authorize separate taxation of units, to empower the unit owners association to determine and collect common expense assessments and impose liens for nonpayment, to preclude suit by unit owners for partition of common areas, and to establish a set of uniform and clearly defined basic rights and duties governing ownership. *See id.*

14. Section 5311.07 required:

A set of drawings shall be prepared for every condominium property which show graphically all the particulars of the building or buildings including, but not limited to the layout, location, designation, and dimensions of each unit and the layout, location, and dimensions of the common areas and facilities and limited common area insofar as is graphically possible. Said drawing shall bear the certified statement of a registered surveyor and registered architect or registered surveyor and licensed professional engineer that said drawings accurately show the building or buildings as constructed.

OHIO REV. CODE ANN. § 5311.07 (Page 1970).

The term "as constructed" has been interpreted to mean that "the property must be substantially completed to the extent that actual measurements may be made. It is not possible to create a condominium where some buildings are completed, others partially completed, and still others are barely commenced." OHIO LEGAL CENTER INSTITUTE, REFERENCE MANUAL FOR CONTINUING LEGAL EDUCATION PROGRAM, REAL EST. X, CONDOMINIUMS 9.07 (1973) [hereinafter cited as REFERENCE MANUAL].

15. OHIO REV. CODE ANN. § 5311.06(C) (Page 1970). The statute further required that the declaration contain a description of the building or buildings in terms of principal construction materials and the number of stories, basements, and units, *id.* § 5311.05(B)(4), and a designation of each unit in terms of location, area, number of rooms, and immediately accessible common areas. *Id.* § 5311.05(B)(5).

consisting of "the proportion that the fair value of the unit at the date said declaration is filed for record bears to the then aggregate value of all the units having an interest in such common areas and facilities."<sup>16</sup> Thus, percentage interests could not be assigned until all the units had been constructed and their individual and collective value had been determined. In addition, the Ohio statute prohibited alteration of the percentage interests as originally assigned except by the filing of an amendment to the declaration unanimously approved by all unit owners affected.<sup>17</sup> Further requirements of chapter 5311 which dovetailed with the scheme of a predetermined project have created additional uncertainties for developers, lenders, title companies, and purchasers as to the legal consequences of various condominium plans.<sup>18</sup>

The practical effect of these requirements was to restrict the flexibility of a developer by theoretically disabling him from planning and marketing a condominium of indeterminate size, with the ultimate number and mix of units comprising the project being contingent on market demand and acceptance. In short, it was theoretically impossible to build a condominium in phases by adding units and common areas to the initial phase at a later date.<sup>19</sup> The net result was the creation of a hiatus which could cause financial loss and inconvenience to both builders and purchas-

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16. *Id.* § 5311.04(B). Although the language of the statute did not actually require that fair *market* value be determined, it appears that developers were hesitant to assign a dollar value to units in the absence of empirical evidence as to sales value. Johnakin, *A Second Generation of Condominium Statutes*, LAW. TITLE NEWS, May-June 1974, at 2.

17. OHIO REV. CODE ANN. § 5311.04(C) (Page 1970).

18. For example, § 5311.03(C) required that each unit "have a direct exit to a public street or highway or to a common area and facility leading to a public street or highway." *Id.* § 5311.03(C). See notes 97-102 *infra* and accompanying text.

19. Commentators have suggested that careful preliminary testing of community interest may diminish the need for phase development.

Perhaps the easiest and most direct way to gauge the marketability of proposed units is a procedure . . . [whereby] . . . [n]onbinding-unit reservations and token good-faith payments are received following a newspaper advertisement that solicits interest. In the majority of cases where this procedure has been adopted, the immediate response correctly foretold the eventual success or failure of the planned property and was helpful in determining mortgage financing.

D. CLURMAN & E. HEBARD, *supra* note 1, at 27.

However, a developer may be compelled to build in small phases because lenders commonly require, especially in cluster developments, that 50% to 90% of the proposed units be under contract before they release construction funds. *Id.* at 42. It is also possible that a developer may be forced to escrow deposits and permit potential buyers to occupy units on an interim lease basis until a certain percentage of all units is under contract. Bohan, *A Lawyer Looks at Residential Condominiums*, A.B.A. REAL PROP. PROB. & TRUST J. 7, 14 (1972).

ers.<sup>20</sup> The capital risk of a builder was maximized; he was additionally burdened with interest on construction loans until total completion of the project. Moreover, potential purchasers could be lost because of a builder's inability to convey title promptly upon completion of each individual unit.<sup>21</sup>

These problems with phase development were among those addressed recently by the Ohio legislature in enacting substantial amendments to chapter 5311.<sup>22</sup> While the above-mentioned statutory provisions are retained in the amended statute, the new legislation obviates their restrictive character by altering their application to condominiums constructed in phases and by establishing a procedure whereby condominium developments can be constructed progressively. Nevertheless, an examination of the attempts to work under the original statutory scheme is essential to an assessment of the changes introduced by the new legislation. A knowledge of the problems inherent in attempts to develop condominiums in phases is also important since the amendments do not apply retrospectively.<sup>23</sup> Thus, this Note focuses on the progressive construction of condominiums under both the old and new statutory schemes. The Note also highlights several ambiguities in the statute and concludes by considering the legislation in light of its ability to solve planning and marketing problems and to balance the interests between builder and purchaser.

## I. HISTORICAL RESTRAINTS

Before proceeding further, some awareness of the genesis of the condominium concept in the United States is helpful for an understanding of the restraints on phase development embodied in the original Ohio statutory scheme. The growth and acceptance of the condominium concept in the United States had its immediate origin in Puerto Rico.<sup>24</sup> In 1961, section 234 was amended to

20. Joliet, *The Expandable Condominium: A Technical Analysis*, 9 A.B.A. L. NOTES 19 (1972).

21. *Id.*

22. AM. SUB. H.B. 404, 112th Cong., Reg. Sess. (1977-78) (codified at OHIO REV. CODE ANN. §§ 5311.01-.09, .11, .13, .18, .21-.27 (Page Supp. 1978)). See notes 103-09 *infra* and accompanying text. See note 116 *infra* for a list of state statutes which specifically allow for phase development.

23. *But see* text accompanying note 130 *infra*.

24. See, e.g., Schreiber, *Lateral Housing Development: Condominium or Home Owners Association?*, 117 U. PA. L. REV. 1104, 1109 (1969). The existence of condominiums, however, has been traced back as far as Ancient Rome. Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 987 n.5 (1963). For an informative analysis

the National Housing Act to provide for Federal Housing Administration insurance on low downpayment mortgages for individually owned, single-family units in multi-unit, multifamily structures, where such ownership was recognized under state law.<sup>25</sup> In addition, the FHA promulgated a "Model Statute for Creation of Apartment Ownership"<sup>26</sup> which merely delineated the essentials for a condominium compatible with FHA financing.<sup>27</sup> While section 234 authorized FHA insurance on a nationwide basis, it was enacted in response to problems in Puerto Rico.<sup>28</sup> In hopes of stimulating construction of condominium units in high-rise apartment buildings to alleviate crowded urban centers, the Puerto Rican "Horizontal Property Act"<sup>29</sup> had been enacted in 1958, contemplating high-rise buildings divided horizontally into separate units.<sup>30</sup> The enactment of section 234 set the stage for the rapid passage of condominium enabling legislation in all fifty states, the District of Columbia, and the Virgin Islands, ostensibly to secure the benefits of the FHA program.<sup>31</sup>

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of condominiums in Western Europe, see Leyser, *The Ownership of Flats—A Comparative Study*, 7 INT'L & COMP. L.Q. 31, 33 (1958).

25. Housing Act of 1961, Pub. L. No. 87-70, § 104, 75 Stat. 149 (codified at 12 U.S.C. § 1715y (1976)). In 1964 the section catchline "Mortgage Insurance for Individually Owned Units in Multi-Family Structures" was changed to "Mortgage Insurance for Condominiums." Housing Act of 1964, Pub. L. No. 88-560, § 119 (a)(1), 78 Stat. 769 (codified at 12 U.S.C. § 1715y (1976)).

26. FEDERAL HOUSING ADMINISTRATION, MODEL STATUTE FOR CREATION OF APARTMENT OWNERSHIP, reprinted in 1A P. ROHAN & M. RESKIN, CONDOMINIUM LAW & PRACTICE app. B-3, at 27 (1973) [hereinafter cited as FHA MODEL ACT].

27. Rohan, *Second Generation Condominium Problems: Construction of Enabling Legislation and Project Documents*, 1 VAL. L. REV. 77, 91 n.69 (1966). As a result, the model statute lacks many provisions essential for a complete statute. *Id.*

28. See *Hearings on Various Bills to Amend the Federal Housing Laws Before a Subcommittee of the Senate Comm. on Banking and Currency*, 86th Cong., 2d Sess. 585 (1960); S. REP. NO. 281, 87th Cong., 1st Sess. 16-17, reprinted in [1961] U.S. CODE CONG. & AD. NEWS 1923, 1937-38; Kerr, *supra* note 3, at 5-6.

29. P.R. LAWS ANN. tit. 31, §§ 1291-1293k (1967 & Supp. 1977).

30. One commentator has noted:

As indicated by its title, 'Horizontal Property Act,' the Act envisaged high-rise structures divided horizontally into separate units, rather than into units separated solely by vertical planes. Accordingly, the Act specifies that it applies only to a project consisting of a 'building' (in the singular) or 'apartment house,' and it repeatedly refers to each unit as an 'apartment' occupying all or part of a floor. None of these terms is appropriate for a group of distinct one-family structures horizontally adjacent to one another.

Schreiber, *supra* note 24, at 1109 (footnotes omitted).

31. For a complete compilation of condominium legislation, see 1A P. ROHAN & M. RESKIN, *supra* note 26, app. B-1.

Characterization of the flood of condominium enabling legislation as the *direct* result of passage of § 234 may be somewhat misleading. FHA financing has generally been avoided "because of the multitude of requirements to be met by the developer, the unfamiliarity

In essence, problems which have arisen regarding phase planning and marketing can be traced to the fact that original condominium legislation was premised on contained high-rise apartment condominiums. This initial preoccupation was perpetuated by the wholesale manner in which the individual states borrowed from the Puerto Rican, FHA, and sister state statutes in enacting condominium legislation.<sup>32</sup> For example, sections of the Ohio statute providing for permanency of common interests and providing that percentage common interests be determined by the proportion of unit value to the aggregate value of the project can

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with 234 financing on the part of many lenders, the lack of consistency shown on the parts of F.H.A. staff personnel in processing procedures, and the inordinate delays experienced . . . ." REFERENCE MANUAL, *supra* note 14, at 5.06. One commentator has suggested that some of the lethargy in the § 234 program was built into the law intentionally. D. CLURMAN & E. HEBARD, *supra* note 1, at 5. For an exposition of the basic requirements of FHA financing, see *id.* at 64-75.

The passage of § 234 was important, however, because it brought condominiums to the attention of lawyers, real estate concerns, and mortgage investors throughout the United States, and popularized this form of ownership.

It is interesting to note that the FHA § 203(b) mortgage insurance plan, which was designed for single-family detached housing, was originally being used in some condominium developments. Many developers and attorneys interpreted § 5311.02, providing that "[n]either the submission of property to the provisions of Chapter 5311 of the Revised Code, nor the conveyance or transfer of ownership of a unit shall constitute a subdivision within the meaning of or be subject to Chapter 711 of the Revised Code," to mean that *any* project that qualified as a condominium need not comply with subdivision requirements and regulations. OHIO REV. CODE ANN. § 5311.02 (Page 1970). The statute was further misinterpreted as, in effect, providing that common areas and facilities could be comprised of all the land in the project *except* the parcels of land on which individual units were constructed. These misunderstandings resulted in the construction of "hybrid condominiums"—a cross between a condominium and a planned unit development (PUD), typically consisting of for-sale housing developed at high densities outside the subdivision regulations. Unit purchasers owned the land underlying their unit, thus making them eligible for § 203(b) financing. The only condominium aspects of the developments were ownership of an undivided interest in the remaining land and common areas and facilities, and unit owner membership in an association, the main responsibility of which was typically the purchase of fire insurance. Thus, developers were able to offer traditional townhouse projects which did not comply with subdivision regulations, while still taking advantage of federal mortgage insurance. This practice was halted when the Ohio Attorney General ruled that property cannot qualify as a condominium under chapter 5311 where it consists of groups of lots, where each lot is intended for private ownership to the exclusion of any interest therein by other property owners in the project, and where the common areas consist primarily of roads and similar types of commonly used property. 71-031 OP. OHIO ATT'Y GEN. 2-98 (1971).

32. The rapid manner in which state condominium statutes were enacted has been characterized as "mass production," 1 P. ROHAN & M. RESKIN, *supra* note 26, § 16.02[2], and "Caesarean" birth. Outen, *Condominium "Jump-Up,"* LAW. TITLE NEWS, Feb. 1964, at 3.



be traced to similar requirements in the Puerto Rican statute.<sup>33</sup> Sections requiring that each unit have a direct exit to a public street or highway or to a common area leading to such street or highway and requiring the filing of certified plans of the project as constructed can be traced to similar provisions in the FHA Model Statute.<sup>34</sup>

The point should be stressed, however, that chapter 5311 was clearly the result of some deliberation and foresight on the part of its drafters, as evidenced by improvements which were made over the original prototypes. The mere use of the title "Condominium Property" was a marked improvement, as the title "Horizontal Property Act," chosen by several states in emulation of the Puerto Rican Act,<sup>35</sup> carried the notion that the Act contemplated only high-rise structures divided horizontally into separate units, rather than into units separated solely by vertical planes.<sup>36</sup> Several original state statutes expressly provided that they were applicable only to multi-unit structures, rather than to developments composed of separate one-family structures.<sup>37</sup> By defining "unit" as "a part of the condominium property consisting of *one or more rooms on one or more floors* of a building or buildings,"<sup>38</sup> the Ohio statute did not necessarily require that a development be made up of multi-unit structures but impliedly allowed a building to be comprised of only one unit.<sup>39</sup> By defining "condominium

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33. Compare OHIO REV. CODE ANN. § 5311.04(C), .04(B) (Page 1970) with P.R. LAWS ANN. tit. 31, § 1291f (1967).

34. Compare OHIO REV. CODE ANN. §§ 5311.03(C), .07 (Page 1970) with FHA MODEL ACT, *supra* note 26, §§ 1(a), 13.

35. *E.g.*, IOWA CODE ANN. § 499B.1 (West Supp. 1978).

36. *See* note 30 *supra*.

37. *E.g.*, "An Act Concerning the Ownership of Individual Units in Multi-Unit Structures," ILL. ANN. STAT. ch. 30, § 301 (Smith-Hurd 1969).

38. OHIO REV. CODE ANN. § 5311.01(G) (Page 1970) (emphasis added). The recent amending legislation, *see* note 22 *supra*, deletes the term "or buildings" from the statutory definition of a unit. OHIO REV. CODE ANN. § 5311.01(I) (Page Supp. 1978). The apparent reason for this deletion is to obviate the logical import of the original language that an individual unit could encompass two separate buildings.

39. The Puerto Rican statute, by contrast, required that an "apartment" comprise all or part of one floor in a building of one or more floors. P.R. LAWS ANN. tit. 31, § 1291a (1967). Recent amendments to the Puerto Rican statute, however, change substantially the definition of an apartment to "any unit of construction, sufficiently delimited, consisting of one or more cubic spaces, closed, partially closed, or open . . . provided said unit be susceptible to any type of independent utilization . . ." *Id.* § 1291a (Supp. 1977). Under this definition single unit structures would clearly be possible.

In recognition that the condominium concept could be used for lateral housing in addition to high-rise structures, the National Housing Act was extended in 1964 to authorize insurance for detached one-family units. The Act was amended to provide that it applied

property" to mean "land together with all *buildings*,"<sup>40</sup> chapter 5311 contemplated projects comprised of several buildings, and by including the vertical planes of the walls as boundaries of a unit,<sup>41</sup> the Ohio Act, by implication, contemplated some lateral conveying.

In addition, the mere utilization in the Ohio statute of the term "unit" instead of "apartment" avoided much of the confusion that had existed under other statutes concerning whether the residential connotations of the latter term prohibited the submission of a commercial or industrial condominium. Chapter 5311 improved on legislation originally adopted in other states by providing for "limited common areas and facilities"<sup>42</sup> and by allowing for leasehold property to be submitted under the Act.<sup>43</sup>

While state statutory schemes were based on the general assumption that condominiums in the United States would involve predominantly high-rise structures, the most popular condominium projects have been cluster, townhouse, and garden apartments, all of which are typically low-rise projects.<sup>44</sup> The key factor in these projects is that units can be occupied by residents before all the buildings in the same project are completed.<sup>45</sup> While the original Ohio statutory scheme did not provide that a condominium must consist exclusively of a single building,<sup>46</sup> it did contemplate the total completion of the project before submission of the property to the Act and the conveyance of units,<sup>47</sup> thus evidencing a neglect of planning and marketing aspects of real estate development.<sup>48</sup>

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to one-family units in a multifamily "project," instead of one-family units in a multifamily "structure." Housing Act of 1964, Pub. L. No. 88-560, § 119(a)(2), 78 Stat. 769 (codified at 12 U.S.C. § 1715y (1976)).

40. OHIO REV. CODE ANN. § 5311.01(A) (1970) (emphasis added).

41. *Id.* § 5311.03(D); see note 3 *supra*.

42. Limited common areas include "those common areas and facilities designated in the declaration as reserved for use of a certain unit or units to the exclusion of other units." OHIO REV. CODE ANN. § 5311.01(I) (Page 1970). Typical limited common areas are balconies, patios, or elevators serving only certain areas.

43. *Id.* § 5311.02.

44. 1 P. ROHAN & M. RESKIN, *supra* note 26, § 16.02[3].

45. A developer could, however, rent units on an interim basis before legal formation of the condominium. See Bohan, *supra* note 19, at 14.

46. See text accompanying notes 38-39 *supra*.

47. See notes 14-18 *supra* and accompanying text.

48. 1 P. ROHAN & M. RESKIN, *supra* note 26, § 16.02[4] ("Legislative draftsmen undoubtedly envisaged two principal alternatives, either the project would come to fruition as originally planned or would be abandoned and all deposits refunded.").

## II. EXPANDING CONDOMINIUMS UNDER THE ORIGINAL ACT

Although the Ohio statute restricted phase development of condominiums, counsel for developers created several methods of circumventing the statute.<sup>49</sup> Most of these took advantage of the vagueness of the provisions<sup>50</sup> and the lack of both legislative history and case law interpreting these provisions.<sup>51</sup> This part of the Note describes certain of these methods and examines the problems inherent in each.

### A. *Multilateral Consent*

First, it should be noted that under the original condominium statute a developer could indeed expand a condominium project by adding additional land and building more units. This required, however, the filing of an amendment to the declaration reallocating percentage interests unanimously approved by all unit owners affected.<sup>52</sup> In this way a developer could vary the original number and mix of units that would ultimately comprise the entire project in accordance with market factors and purchaser needs. However, depending on the number of original unit owners, obtaining consent could be a formidable task.<sup>53</sup> Contacting all unit owners, mortgagees, and lienholders claiming an interest in both the original condominium and the additional land, and securing their consent to the addition and reallocation of percentage interests could be prohibitively time consuming. This task could be further complicated by intervening liens or the recalcitrance, incompetency, or death of a unit owner.<sup>54</sup>

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49. Joliet, *supra* note 20, at 20. See generally Note, *Phasing Condominiums*, 48 ST. JOHN'S L. REV. 872 (1974).

50. Walter, *Condominium Government: How Should the Laws Be Changed?*, 4 REAL EST. L.J. 141, 151 (1975).

51. Only one case specifically involving condominiums has been reported in Ohio. *Grimes v. Moreland*, 41 Ohio Misc. 69, 322 N.E.2d 699 (C.P. Franklin County 1974). See note 164 *infra*. Thus, as one commentator has stated, "In providing advice about condominium law, the legal practitioner must rely almost exclusively upon his interpretation of the condominium legislation of the situs of the proposed or existing condominium." Rosenstein, *Inadequacies of Current Condominium Legislation—A Critical Look at the Pennsylvania Unit Property Act*, 47 TEMP. L.Q. 655, 655 (1974).

52. OHIO REV. CODE ANN. § 5311.04(C) (Page 1970).

53. See, e.g., Amendment No. 1 to Declaration of Condominium Ownership for Bear Creek Village Condominium, 12400 Cuyahoga County Records 747 (March 7, 1969). Here the existing condominium, consisting of only six townhouse units in one building, was small enough to facilitate expansion through multilateral consent. REFERENCE MANUAL, *supra* note 14, at 4.37.

54. See Joliet, *supra* note 20, at 22-23. Another method which probably would not have conflicted with the Ohio statute would have involved the sale of units before the

### B. *Chinese Menu*

One approach to circumventing the statutory restraints entailed listing the requisite percentage ownership interest for the first phase units in the original declaration, and also listing in a series of columns the projected decreasing percentages assigned to each unit in the initial and proposed later stages should a certain number of units be added. The right to file the declaration of new phases would be reserved to the developer and the option to construct additional phases would be limited in time.<sup>55</sup> Since the proposed phases of construction were set out in a series of columns, this method came to be known as the "Chinese Menu" approach.<sup>56</sup>

Several problems with this approach are apparent. First, locking the developer into a rigid predetermined scheme defeated a major reason for using phased development—retention of flexibility of operation, unit mix and price, and adaptation to market demand. Second, because section 5311.04(B) required that a unit's appurtenant interest in common areas equal its fair value divided by the total project value, one could accurately predict projected later phase percentages only if the development was unusually homogenous and was to be completed in a very short period of time.<sup>57</sup> Finally, it has been argued that this method of expansion adversely affected the marketability of condominium units.<sup>58</sup> While the first two problems were insurmountable under

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recording of the declaration, thus causing a delay in the legal formation of the condominium project and the allocation of percentage interests. Purchase contracts would be conditioned on the sale of a specified number of units by a certain date at which time the developer would be obligated to decide the precise number of units to be built and to allocate common interests pursuant to a formula set forth in the contracts. The drawbacks of this approach include: (1) uncertainty as to whether the specified minimum number of purchase commitments would be obtained; (2) a failure to provide developers with flexibility to postpone decisions regarding the number of units to be constructed; and (3) the unwillingness of buyers to contract for purchase where the precise number of units that will comprise the project and respective common interests are unknown. Schreiber, *supra* note 24, at 1120-24.

55. *E.g.*, Declaration of Condominium Ownership for King James South Anysley Court Condominium, 13652 Cuyahoga County Records 155, ¶ 21B (July 25, 1974) (providing for the addition of one other phase). See Buck, *Condominiums That Grow—Another View*, LAW. TITLE NEWS, March-April 1972, at 12; Note, *supra* note 49, at 880-83.

56. The origin of this term is uncertain.

57. REFERENCE MANUAL, *supra* note 14, at 9.11.

58. Buck, *supra* note 55, at 11.

When a person purchases an apartment in a condominium, he is usually purchasing a fixed share of the common areas and facilities. This includes an appraised value in the swimming pool, the parking areas, and the various amenities that accompany his ownership. The developer may be able to legally reserve an exec-

the original statutory scheme, the latter could be overcome by having the original declaration delineate the rights of the developer and describe separately each parcel of land to be added. In addition, there could be no deviation from this plan once the initial declaration had been filed and units in the first stage sold.<sup>59</sup>

### C. Powers of Attorney

Another method, often tied to the above approach, involved giving to a developer, through the original deeds and documentation, the power to expand a condominium unilaterally and to reallocate percentage interests without the multilateral consent of all unit owners. This was typically accomplished either by executing a separate power of attorney or by including language in the original declaration and deed which stated that by accepting the deed conveying ownership (or a mortgage encumbering such interest), the grantee irrevocably appointed the grantor as his attorney in fact, coupled with an interest, to amend the original declaration so as to add more units and reallocate percentages.<sup>60</sup>

Because a single conveyance created all the estates which would be vested in unit purchasers, the declaration and unit deeds had to specifically spell out these interests. In effect, each unit owner received a defeasible interest in the common areas. Upon the completion of later phases, title to the common areas reverted to the developer<sup>61</sup> so that he could convey to the purchaser of

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utory ownership interest in such interests, but unless the appraisal of such an interest is readily available at the time of purchasing and mortgaging, there will remain a very practical cloud on the title of the apartment.

*Id.* at 12.

59. Outen, *Condominiums That Can Grow*, LAW. TITLE NEWS, Sept.-Oct. 1971, at 11. The author states, however, that strict compliance with the plan would not preclude readjustment of common element interests as between units within a phase itself through division or consolidation. *Id.* at 14.

A second phase was added to the King James South Anysley Court Condominium, *supra* note 55, and an amendment listing the new percentage interests was filed. There is some variation between the percentages as originally projected and as later assigned. These variations, however, are only 1/100th of a percentage point. Amendment to the Declaration of Condominium Ownership for King James South Anysley Court Condominium, 14263 Cuyahoga County Records 403, ¶ 5 (July 1, 1976).

60. *E.g.*, Declaration of Condominium Ownership for Greenwood Village Condominium No. 1, 5061 Summit County Records 373, ¶ 16 (Aug. 11, 1970). The declaration includes a provision which states that the purchaser and mortgagee consent to the developer reserving an option to add one or two more phases, to file amending declarations, and to reallocate percentage interests within five years. *Id.* at ¶ 15. See also King James South Anysley Court Condominium, *supra* note 55, at ¶¶ 21C-D.

61. "A careful review of real property principles reveals that we are here creating a future interest in the developer, a limited right to change the nature of the real estate inter-

each new unit an undivided interest in the common areas of the entire project. Conversely, the owners of units in the original phase received a future interest in the common areas of subsequent phases in proportion to their percentage interest in the original project. The completion of each new phase and the filing of an amended declaration was the stated event which converted the future interest into a present interest.<sup>62</sup>

A primary problem with this "power of attorney" or "open-ended" method of expansion was whether the attorney in fact designation was binding on subsequent purchasers.<sup>63</sup> Under Ohio law one must execute a power of attorney in the same manner as a deed.<sup>64</sup> Nevertheless, since many purchasers never saw or read a copy of the declaration prior to receipt of the deed—or did not understand it if they did read it—the binding effect of the designation has been questioned.<sup>65</sup> Moreover, because this method allowed a developer to amend percentage interests unilaterally, it militated against concepts of marketability and mortgageability and an equitable distribution of the condominium's tax burden.<sup>66</sup>

Unless the original declaration clearly set out any additional property which could be added to the condominium at a later date, the title could be unmarketable because the future interest of the first phase unit owners had no specific subject matter.<sup>67</sup> The problem arises not from the mere possibility of defeasance but from defeasance in an unknown amount<sup>68</sup> which, if left to the unilateral discretion of the developer, could create such uncertainty

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est held by the unit owners." Johnson, *Condominium Practice: A Second Look*, 51 N.D.L. REV. 761, 766 (1975). "This is in the nature of a reversionary interest." *Id.* at n.19.

62. Note, *Cubes of Air: Planning a Condominium Development Under the Minnesota Act*, 1 WM. MITCHELL L. REV. 89, 128 (1974).

63. To alleviate these problems where there is a sale of a unit to a third party prior to the contemplated amendment, it has been suggested that the requirement of a power of attorney for such purposes be made a covenant running with the land. REFERENCE MANUAL, *supra* note 14, at 5.13.

64. OHIO REV. CODE ANN. § 1337.01 (Page 1970).

65. Joliet, *supra* note 20, at 20.

66. The ability of a developer to amend percentage interests unilaterally might also violate the due process provisions of the Federal and Ohio Constitutions. See U.S. CONST. amend. V; OHIO CONST. art. 1, § 16; Buck, *supra* note 55, at 11 ("Action by owners in reducing the property rights of any one owner can be considered the removal of property interests by other than governmental action, and certainly without compensation.").

67. See Outen, *supra* note 59, at 13.

68. Since § 5311.14 (B) provides that 75% of the unit owners may terminate a condominium in the event of damage to or destruction of all or any part of the common areas, it can be argued that all condominium units are essentially vested in fee simple determinable. OHIO REV. CODE ANN. § 5311.14(B) (Page 1970). However, it can also be argued that there is an important difference between the nature of defeasibility of title where the right

and indefiniteness in the conveyance as to render the title unmarketable.<sup>69</sup> The language of section 5311.06(C) caused further ambiguity with respect to condominium title matters: "Errors or omissions in the declaration, bylaws, or drawings or a failure to file the same for record shall not, however, affect the title of a grantee of a unit."<sup>70</sup> Read in its broadest sense this provision could be construed to obviate any marketability of title concerns in condominium expansion, even upon failure to file the requisite instrumentation. However, this provision has not been interpreted in this manner by title insurers and in general has furnished them little comfort.<sup>71</sup>

The possibility of fluctuation in percentage interests has also been cited as adversely affecting the free mortgageability of condominium ownership interests.<sup>72</sup> The root of this problem is that a mortgagee must be able to hypothecate the pledgeable interest in the property. This is complicated in the condominium context because upon sale of the common areas after dissolution or destruction, the proceeds are considered as one fund and are distributed to unit owners in proportion to their respective percentage interests.<sup>73</sup> Thus, the loan is based on the market value of the unit property as modified by the potential common sharing figure. The possibility of a shift in the percentage interest through the unilateral action of a developer, especially if this value would be considerably lower than the original value, could result in a dilution of

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is reserved by the developer in the declaration and defeasibility by vote of unit owners after a partial destruction of condominium property.

69. It is unclear the extent to which the subject matter of the future interest must be specifically described in the original declaration.

Nothing in the "book" defines a "subject matter" so it might be either a description of the subsequent phase properties or of a tract out of which subsequent phases may be cut. The option to add apartments in unlimited number is unacceptable. An option to add property identified vaguely, such as land adjoining or contiguous to phase one land is not proper.

B. OUTEN, CARDINAL CONDOMINIUM CONSIDERATIONS at 11 (unpublished memorandum, Lawyers Title Insurance Corp., Richmond, Va.). Cf. Declaration of Condominium Ownership for Captain's Cove Condominium, 14660 Cuyahoga County Records 997, art. XXI (Jan. 11, 1978) (giving a metes and bounds description of additional land but not specifying the number of units that may be added).

70. OHIO REV. CODE ANN. § 5311.06(C) (Page 1970).

71. Conversation with Leo J. Joliet, Branch Counsel, Lawyers Title Insurance Corp., Cleveland, Ohio (Jan. 21, 1978). Current legislation tightens this by deleting the phrase referring to failure to file and changing § 5311.06 to read: "Errors or omissions in the declaration, bylaws or drawings do not affect the title of a grantee of a unit." OHIO REV. CODE ANN. § 5311.06 (Page Supp. 1978).

72. Buck, *supra* note 55, at 11-12.

73. OHIO REV. CODE ANN. § 5311.14(B) (Page 1970).

security on the loan.<sup>74</sup>

In regard to taxation of condominium units, the percentage interest in common areas assigned to a unit may control that unit's liability for real estate taxes. In many instances the tax obligation of a unit is determined by assessing the entire project as if it were in single ownership. This overall valuation figure is multiplied by the percentage interest allocated to each unit in the declaration to arrive at the individual real estate tax assessment.<sup>75</sup> Thus, the reserved right of a developer to alter the ratio between unit values could lead to the inequitable reallocation of tax values among unit owners. One commentator has observed that this possibility might, *inter alia*, be grounds on which a purchaser could void a contract of sale.<sup>76</sup>

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74. This possibility of dilution of security also exists when phase development is legislatively sanctioned. Because of this, lenders have generally insisted that the complete plan for the entire project be set forth in the original instruments and that the value of the unit owner's interest in the common elements be substantially the same after each phase is added. Fegan, *Condominium Financing*, 48 ST. JOHN'S L. REV. 799, 810 (1974). Mortgage agreements generally include a "specific provision for release of the lien of the mortgage on the applicable percentage interest in the original common areas and automatic and simultaneous reattachment to the new percentage interest in the expanded common areas." Bruce, *Eleven Years Under the Indiana Horizontal Property Act*, 9 VAL. L. REV. 1, 19 (1974).

75. Conversation with Cuyahoga County Auditor's Office (Jan. 23, 1978); conversation with Lucas County Auditor's Office (Aug. 14, 1978). See Note, *Condominium Unit Real Estate Tax Assessment Problems*, 48 ST. JOHN'S L. REV. 923, 928-29 (1974). But see REFERENCE MANUAL, *supra* note 14, at 2.10, stating:

Generally, the Auditor will appraise each individual Unit and then appraise the Common Areas and Facilities separately. Each Unit Owner is then charged on the basis of the appraisal of his individual Unit and his proportionate share, based upon his percentage of ownership, of the Common Area and Facilities Appraisal.

The proper method of arriving at real estate tax liability has been litigated in other jurisdictions with various results. See 1 P. ROHAN & M. RESKIN, *supra* note 26, § 7.05.

When real estate tax liability is arrived at through the single assessment method, the net effect is that the proportion of taxes in the entire project is fixed in what could be called a "lock-step" by the assignment of percentage interests. Conversation with Leo J. Joliet, *supra* note 71. Thus, if the whole condominium has been overassessed, and one unit owner successfully challenges his tax assessment as being too high, under the lock-step rationale, taxes of every other unit in the project should be lowered. Because of the requirement that percentage interests can be changed only by unanimous consent, a unit owner who feels that his taxes are *disproportionately* high in relation to other unit tax bills has two alternatives: he can attempt to persuade all unit owners to execute a voluntary amendment and reallocation of percentage interests, or file an action in court to have the percentage interests reallocated. It has been submitted, however, that the use of percentage interests to apportion individual unit tax liability precludes tax protests based on allegations of incorrect apportionment in that each taxpayer agrees to the validity of the division when he purchases his unit. Thus, overvaluation of the entire project may be the only ground for challenge. Note, *supra* at 929-30.

76. Joliet, *supra* note 20, at 21. An inequitable reallocation of tax liability can result



In sum, the source of the problems and objections which have arisen in regard to constructing condominiums in phases is the resultant shifting and indeterminate nature of percentage interests. Indeed, one of the main factors in formulating an opinion on the efficacy of an expandable condominium is how much reverence is paid to the permanency of the percentage interest requirement and what the percentage interest actually represents. Arguably, since only the spacial unit is owned exclusively in fee, this is the only real interest of value in a condominium; the percentage interest in the common areas and facilities is of little or no consequence. Thus, unilateral alteration of percentage interests by a developer would not deprive a unit owner of any substantial right. Alternatively, one may argue that although a unit owner's numerical percentage may be decreased with the addition of subsequent phases, he accordingly receives an interest in a greater amount of property and therefore, the change in his interest is only marginal.

Nevertheless, certain interests and obligations besides ownership of common areas were determined by the percentage interest, including the proportion of maintenance assessment,<sup>77</sup> distribution of proceeds from sale after destruction or damage,<sup>78</sup> distribution of common expenses and profits,<sup>79</sup> ownership after dissolution,<sup>80</sup> and, unless otherwise provided in the declaration, voting rights.<sup>81</sup> Consequently, the reservation by a third person of the right to alter percentage interests had further ramifications. In

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even when phase development is statutorily sanctioned. Recent legislation combats this possibility by requiring that percentage interests between initial phase owners be reallocated uniformly. OHIO REV. CODE ANN. § 5311.04(B) (Page Supp. 1978). This uniform reallocation, however, ignores increases in value of certain individual units due to permanent improvements and decreases in value due to deterioration.

77. OHIO REV. CODE ANN. § 5311.04(E) (Page 1970).

78. *Id.* § 5311.14(B).

79. *Id.* § 5311.21.

80. *Id.* § 5311.17(C).

81. *Id.* § 5311.22(A). Under the recent amending legislation, these rights and responsibilities continue to turn on the unit owners' percentage interest in common elements. A new distinction, however, is made between common surplus and common profits. The former refers to the amount that proportionate common assessments exceed common purpose expenses. The latter refers to the amount that income from special assessments, rentals, and other fees exceeds allocable expenses. *See* OHIO REV. CODE ANN. §§ 5311.01(B), .01(G) (Page Supp. 1978). Having all these rights and responsibilities turn on percentage ownership interests which are based on unit value can produce some inequities. The owner whose unit has a higher market value because, for example, he has a better view, may pay a substantially higher maintenance fee for common areas, which are used as much or more by those owning units having lower market values. This has served as an impetus for the drafters of the recent legislation to provide that percentage interest may be determined on the basis of an assigned par value. *See* notes 145-48 *infra* and accompanying text.

addition, the statutory requirements which seemingly restricted phase development<sup>82</sup> were designed to inform unit buyers of the size of the project and to assure them that the project would be completed. Under phase development, although each unit owner might contribute less as more units are added, he might ultimately share the land and facilities with more people than anticipated.<sup>83</sup>

#### D. *Title Insurers Standards for Phase Development*

As one commentator has noted, the issue in expanding condominiums has generally been one of what has been acceptable to title insurance companies.<sup>84</sup> Although these companies have somewhat reluctantly insured expandable condominium titles, in so doing, they developed prerequisites to insurance which protected consumers against the uncertainties of phase development. The initial declaration had to include the number of units to be added in each phase, a careful description of those units, and an assurance that they would conform to the style and quality of the original phase units. The declaration also had to specify an expiration date for the developer's option to expand within the Rule Against Perpetuities. The developer had to reserve specifically the power to amend the declaration to incorporate additional units into the project and to accordingly reallocate percentages in the common areas, with percentage interests between initial phase units being reallocated uniformly. This had to be done in such a way that all unit owners would have adequate notice of any changes to be made. Finally, the developer had to expand the condominium in good faith compliance with the plan embodied in the original documentation.<sup>85</sup>

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82. See notes 14-18 *supra* and accompanying text.

83. Note, *supra* note 49, at 884.

84. Johnson, *supra* note 61, at 76.

85. These prerequisites have been set out as follows:

- a. Buildings which may be added in subsequent phases must be of substantially the same type, character, style, quality and unit size as those in the initial phase, and the initial Declaration must so provide.
- b. The parcels of land which may be added in subsequent phases must be described with certainty in the initial Declaration.
- c. The number of units to be added in each phase must be specified with certainty in the initial Declaration.
- d. The developer's option to make the additions must have a definite expiration date within the period of the rule against perpetuities. . . .
- e. The initial Declaration must reserve to the developer the irrevocable power ("power coupled with an interest") to amend the Declaration and Drawings for the purpose of incorporating the additions into the condominium if and when they are constructed. . . .
- f. The initial Declaration must provide for a reallocation by the developer of the

### E. Two-Tier Development

Another approach to progressive construction which developed as a byproduct of the original statutory constraints on construction of a single condominium in multiple phases was the two-tier method.<sup>86</sup> Under this approach a developer built successive stages of a project on adjacent land. Each stage<sup>87</sup> became an autonomous legal entity with its own declaration and bylaws.<sup>88</sup> This

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percentage interests in the common areas and facilities among the unit owners as each phase is added, and it must require that such reallocation be based upon the ratio of the value of each unit to the value of the expanded whole at the time each addition is made. The developer must make such reallocations with great care and evident good faith. Prior value ratios between individual units and between each unit and the whole should be preserved unless there are good and sufficient reasons for altering them, and even then the alteration should be relatively minor. . . .

- g. The Declaration should provide that whenever a phase is added, the developer shall furnish a copy of the amendment accomplishing the addition to all prior unit owners and their mortgagees, preferably by registered or certified mail. An affidavit attesting that such copies have been so furnished should then be attached to and recorded with the amendment.
- h. No significant departure from the scheme of expansion embodied in the original Declaration can be permitted. The developer can quit the project after completing any particular phase or he can fail to make any additions at all, but if he proceeds, he must stick fairly close to the plan embodied in the initial documentation.

REFERENCE MANUAL, *supra* note 14, at 9.10-12; *see id.* exhibits D-1, D-2.

86. The "two-tier" label arose from the fact that typically an umbrella owners association was created to manage all the stages. Upon the completion of each stage, the owners of new units became members of the umbrella association as well as members of an owners association for their own stage of the project. This facilitated participation in the management and use of the common elements of the distinct stage and the entire development.

87. The term "stage" is employed here to refer to a separate, autonomous condominium. The two-tier approach is sometimes referred to as "staged development." Schreiber, *supra* note 24, at 1124. However, the term "staged development" has also been used synonymously with "phase development." The latter refers to the situation in which additional land and improvements are brought into the fold of a preexisting condominium development. *E.g.*, Rosenstein, *supra* note 51, at 659.

88. Note, *supra* note 62, at 125-26; *see* Joliet, *supra* note 20, at 19, 23. A variation of this approach involves the actual vesting of title to common areas between the condominiums in a master homeowners association. This has been referred to locally as the "Hardesty Plan," named for the first condominium development of this nature in Columbus, Ohio. II HUD CONDOMINIUM/COOPERATIVE STUDY app., at A-44 (1975); *see* Buck, *supra* note 55, at 13, 19. The homeowners association grants each unit owner a permanent nonexclusive easement over the common areas and receives a lien for maintenance assessments on each unit in the project. *Id.* at 13.

Use of master homeowners associations has been sanctioned by the Urban Land Institute. *See* URBAN LAND INSTITUTE, THE HOMES ASSOCIATION HANDBOOK, TECHNICAL BULLETIN HANDBOOK, TECHNICAL BULLETIN 50 (1964). The Department of Housing and Urban Development has issued model governing documents for staged condominiums with "off-site" community facilities owned by a nonprofit incorporated association. *See* FORMS FOR SERIES OF CONDOMINIUM PROJECTS WITH OFF-SITE COMMUNITY FACILITIES OWNED BY NONPROFIT CORPORATIONS, reprinted in 1 P. ROHAN & M. RESKIN, *supra* note 26, § 16.03[2][a]. This arrangement is akin to the "townhouse association" or Planned Unit

method has found support even when a procedure for phase development has been statutorily sanctioned since under this approach the percentage interests remain fixed, avoiding the problems associated with shifting percentage interests.<sup>89</sup>

The two-tier method of development offers advantages to both developers and purchasers. The capital risk of the developer is minimized because he initially invests in a smaller number of unsold units.<sup>90</sup> The developer retains flexibility in deciding the number of units he will construct and is free to change the unit mix and value of later stages depending on market factors. In addition, the developer need not file an amendment to the declaration, nor obtain the unanimous consent of the owners of initial stage units.<sup>91</sup> Further, he can use his experience gained in selling and operating units in the first stage to modify plans for subsequent stages.<sup>92</sup> Finally, the purchaser may take title to a unit sooner after its construction, rather than after the proposed development has been entirely completed.

Notwithstanding these advantages, the two-tier development has definite drawbacks. The purchaser is subject to the inconvenience of double assessments and double administration.<sup>93</sup> In addition, unless there is participation between the various stages, economies of scale may be diminished or lost. One large condominium may be better able to support recreational facilities or employ professional management.<sup>94</sup> Disadvantages for the developer

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Development (PUD) which generally envisions individual ownership of parcels of real estate and membership in a nonprofit incorporated association. See Johnson, *supra* note 61, at 767-68; REFERENCE MANUAL, *supra* note 14, at 3.09-10. The vesting of title to all common elements in a homeowners association, however, is antithetical to the condominium concept. See notes 1-3 *supra* and accompanying text; REFERENCE MANUAL, *supra* note 14, at 5.12.

89. See notes 68-74 *supra* and accompanying text.

90. Before the recent amendments became effective, if a developer did not wish to construct a single condominium in multiple phases and was unable to obtain a sufficient number of purchase and mortgage commitments, his only option was to construct in tiers. See note 19 *supra*. Under the Ohio statutory scheme, each tier would still have to be completed before conveyance of any units in that stage.

91. See text accompanying note 52 *supra*.

92. Schreiber, *supra* note 24, at 1124-25.

93. Initial stage unit owners can be subject to increased maintenance assessments if larger and more elaborate common facilities are constructed in later stages. Also, difficulties in administration can arise "[s]ince the relationship between the master association and separate condominium regimes is not governed by the condominium statute . . ." Bruce, *supra* note 75, at 19.

94. REPORT OF THE COMMITTEE TO STUDY AND RECOMMEND REVISION OF THE CONDOMINIUM LAWS TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, VA. H. Doc. No. 5, at 7 (1973) [hereinafter cited as VA. REPORT].

include an increased amount of potentially unwieldy documentation. This increase in the complexity of documentation is in large part attributable to the fact that any cooperation between the stages or sharing of common facilities must be worked out through contractual arrangements, easements, covenants, and restrictions.<sup>95</sup>

In short, the primary problem in two-tier development is the effective integration of distinct stages.<sup>96</sup> The requirements of the original Ohio condominium statute, which envisaged total completion of a unitary condominium and which are retained in the current law, also raise problems in the planning and marketing of two-tier developments. Of particular significance is the requirement that "[e]ach unit shall have a direct exit to a public street or highway or to a common area and facility leading to a public street or highway."<sup>97</sup> The potential dilemma created by this requirement can be better understood by considering the following hypothetical.

A developer intends to construct two separate condominium projects on adjacent parcels of land. Access to a public highway will be provided for the first stage by a private road. The projected second stage condominium will be built adjacent to and will require use of that access road. The resultant dilemma is that if the original access road is conveyed to first stage unit owners and is designated as a common area of the first stage,<sup>98</sup> first stage

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95. 1 P. ROHAN & M. RESKIN, *supra* note 26, § 16.03[2]. For the essentials of reciprocal easement agreements, see REFERENCE MANUAL, *supra* note 14, at 4.36-37.

96. See generally Schreiber, *supra* note 24, at 1125-29. Borrowing from the shopping center context, some attorneys have facilitated integration of distinct stages by the use of Reciprocal Easement Agreements (REA's). This is done by conveying one parcel to a strawman who enters into the REA with the other parcel owner. The REA is recorded prior to recordation of the declaration or the conveyance of condominium ownership interests. The declaration will then make express reference to the REA, recognizing its priority, burden, and rights. REFERENCE MANUAL, *supra* note 14, at 4.36-37. Since the condominium ownership interests are conveyed subject to the REA, this approach may violate OHIO REV. CODE ANN. § 5311.12 (Page 1970) which establishes a general prohibition against conveyance of any unit until all liens or encumbrances have been paid, satisfied, or released. REFERENCE MANUAL, *supra* note 14, at 4.37.

97. OHIO REV. CODE ANN. § 5311.03(C) (Page 1970). See note 102 *infra*.

98. The developer may prefer to do this so that the first stage unit owners become responsible for the maintenance of the road as a common area. See OHIO REV. CODE ANN. § 5311.04(F) (Page Supp. 1978). However, if the developer did not convey the road to the first stage owners, he would have to grant an easement in the road in order to provide them with an exit to a public way. This would raise the same question as to the sufficiency of an easement to fulfill the statutory requirement of a direct exit or an exit to a common area that arises with respect to the second stage owners when the road is actually conveyed to the first stage owners. See notes 100-01 *infra* and accompanying text.

owners will collectively acquire exclusive ownership of the road and the power to exclude second stage owners from using the road. A possible solution, other than the construction of another access road, that would allow later stage purchasers to use the road would lie in the reservation by the developer of a perpetual easement in the road with the right to assign a nonexclusive easement to second stage purchasers.<sup>99</sup> The question now presented is whether the requirement of having an exit to a common area and facility may be fulfilled by the transfer to later stage unit owners of an easement in the access road.<sup>100</sup> A lengthy statutory analysis lends support to the conclusion that the reservation and transfer of an easement comports with the statutory mandate and intent.<sup>101</sup>

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99. Ohio case law indicates that a reservation is sufficient to create an easement. *See, e.g., Gibbons v. Ebbing*, 70 Ohio St. 298, 71 N.E. 720 (1904). The developer would reserve a nonexclusive easement, for the benefit of the second stage, of pedestrian and vehicular traffic for ingress and egress over the access road. The developer should also reserve a maintenance and construction easement over the first stage. All easements should appear on the drawings and the declaration should state that all covenants and easements run with the land and that all subsequent purchasers or mortgagees take subject thereto. *See, e.g., Extracts from Declaration of Condominium Ownership for Springside Properties Condominium No. 1, reprinted in REFERENCE MANUAL, supra* note 14, app. III, at 4.53-54.

100. This problem would not arise in several other jurisdictions where a unit is referred to as:

a part of the property designated or intended for any type of independent use, which has a direct exit to a public street or way or to a common element or common elements leading to a public street or way or to an easement or right of way leading to a public street or way . . . .

*E.g., PA. STAT. ANN. tit. 68, § 700.102(14) (Purdon 1965); W. VA. CODE § 36A-1-2(n) (1966).*

101. Support for the proposition that it is possible to grant a fee simple estate in a piece of condominium property while at the same time reserving a perpetual easement can be found by analogy to a Florida court decision in *Mayfair Eng'g. Co. v. Park*, 318 So. 2d 171 (Fla. Dist. Ct. App. 1975). In this case, the condominium declaration specified that each unit owner would have the right to one parking space and that the developer reserved the right to assign at a later time 35 additional parking spaces. All the parking spaces were designated as limited common elements. The unit owners challenged the reservation on the ground that when title to the limited common elements became vested in the unit owners, the developer was no longer a fee owner and thus, had nothing to assign or convey. The court held that while ownership of all the parking spaces passed to the unit owners upon the filing of the declaration, the ownership was subject to the use restrictions set forth in the declaration, *i.e.*, the developer's reserved right to assign the exclusive use of the additional parking spaces.

There is no apparent reason why the same result would not obtain under the Ohio statute. Section 5311.01(K) defines "limited common areas and facilities" as "common areas and facilities designated in the declaration as reserved for use of a certain unit or units to the exclusion of other units." OHIO REV. CODE ANN. § 5311.01(K) (Page Supp. 1978). This may indicate first, that the § 5311.04(A) requirement that common areas and facilities be owned by the unit holders as tenants in common with undivided ownership is not a requirement that the use of those areas inevitably or exclusively correspond to ownership, and second, that the declaration may contain a reservation "for use." Support for the

Nevertheless, this problem further evidences the drafter's neglect

latter proposition, that use may be subject to limitations, can be found in § 5311.05(B)(3), which provides that the declaration shall state "[t]he purpose or purposes of the condominium property and the units and commercial facilities situated therein and the restrictions, if any, upon the use or uses thereof." *Id.* § 5311.05(B)(3). This line of analysis leads to the conclusion that the reservation of an easement would seem merely to impose a limitation on the unit owners' use of the common facility to the effect that such use would not be exclusive, but subject to the use of later stage condominium unit owners to whom the reserved easement would eventually be transferred.

The next question is whether the requirement of having an exit to a common area and facility may be met by transferring to later stage unit owners an easement in the access road. Since an easement is included in the definition of condominium property under § 5311.01(A), and can be considered to be necessary and convenient to the existence of the condominium pursuant to § 5311.01(B), it can be concluded that an easement may be designated in the declaration as a common element. Therefore, ownership of an easement, thus designated in a private access road, may fulfill the statutory requirement of § 5311.03(C) by giving later stage unit purchasers ownership of a common area and facility leading to a public highway. *Id.* § 5311.03(C). *Contra*, Comment, *Areas of Dispute in Condominium Law*, 12 WAKE FOREST L. REV. 979, 1003 (1976) ("The designation of common areas and facilities is not the same as the granting of an easement or rights to use an area in a housing development since common areas are owned jointly by the unit owners.").

Even assuming that an easement, for purposes of chapter 5311, does satisfy the definitional requirements of a common area and facility, the problem is not necessarily solved this quickly. The next issue is whether an easement is "property." If so, a further statutory requirement which may affect the creation and transfer of an easement is that any property submitted to condominium use must be either a fee simple estate or a 99-year leasehold renewable forever. OHIO REV. CODE ANN. § 5311.02 (Page Supp. 1978). Support for the proposition that an easement is property may be found in another provision of the Ohio Revised Code which applies to municipal corporations. Section 701.01 defines "property" to "include rights and easements of an incorporeal nature." *Id.* § 701.01(E), .01(F) (Page 1976). See *Henson v. Stine*, 74 Ohio App. 221, 224, 57 N.E.2d 785, 787 (9th Dist. 1973) (stating that an easement is an incorporeal hereditament—a right or privilege attached to ownership of real property; and being an interest in realty, it can be conveyed only as is realty under statutes). Further, it has been judicially recognized that "an easement appurtenant always implies an interest in the land, or the buildings affixed thereto, and constitutes a part of the real property, over or in which it is to be enjoyed." *Warren v. Brenner*, 89 Ohio App. 188, 192, 101 N.E.2d 157, 160 (9th Dist. 1951). An easement over first stage property for the benefit of second stage unit purchasers would be classified as appurtenant: the initial stage constituting the servient estate and the second stage constituting the dominant estate. Also, an easement designated as a common area will by definition constitute real property for purposes of chapter 5311 pursuant to § 5311.03(A) ("Each unit of a condominium property, together with its undivided interest in the common areas and facilities appurtenant to it, is real property for all purposes and is real estate within the meaning of all provisions of the Revised Code." OHIO REV. CODE ANN. § 5311.03(A) (Page Supp. 1978)).

Although easement and freehold interests are characteristically divergent—the latter entitling the owner to exclusive possession, while the former implying only a limited right to use certain property, see R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 405, at 34-11 (rev. ed. 1978)—it is clear that an easement may be reserved in fee or for 99 years and that the fee or leasehold requirement was intended by the drafters of the statute only to imply a durational requirement with which an easement might comply.

If the developer did not want to vest title to the road in the original stage unit owners, § 5311.03(C) could still be satisfied as to the initial stage unit owners by the *granting* of an

of various planning aspects of real estate development.<sup>102</sup>

### III. EXPANDING CONDOMINIUMS UNDER THE AMENDED STATUTE

Responding to the inadequacies of chapter 5311, and following the lead of several other states,<sup>103</sup> the Ohio legislature passed Amended Substitute House Bill 404<sup>104</sup> on June 13, 1978. The new legislation (the Act) became effective October 1, 1978. While designed primarily to protect consumers through disclosure provisions,<sup>105</sup> the Act also simplifies the language of chapter 5311 and

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easement to them. *See* *Trattar v. Rausch*, 154 Ohio St. 286, 291, 95 N.E.2d 685, 688 (1950) (stating the rule that an easement may be created by grant, express or implied).

102. This problem is not alleviated by the recent amendments which revise § 5311.03(C) to read:

Each unit shall have a direct exit to a public street or highway or to a common area and facility leading to a public street or highway, *except that units in an expandable condominium property may have a direct exit to a permanent easement leading to a public street or highway across additional property identified in the declaration.*

OHIO REV. CODE ANN. § 5311.03(C) (Page Supp. 1978) (emphasis added).

The allowance of an exit through a permanent easement applies only to expandable condominiums constructed in accordance with the provisions of the amendments and thus does not shed any light on the question of whether an exit through a permanent easement in a two-tier development or a nonexpandable condominium will fulfill the statutory mandate. It could possibly be argued that the recent amendment, by negative implication, supports the conclusion that an exit through a permanent easement would not fulfill the statutory mandate. *But see* text accompanying note 179 *infra*. The reservation and transfer of an easement to later stage unit owners may conflict with § 5311.25(B), which prohibits a developer from retaining a property interest in common areas after assumption of control by the unit owners association. *Id.* § 5311.25(B).

103. *E.g.*, FLA. STAT. ANN. §§ 718.101-.508 (West Supp. 1978); GA. CODE ANN. §§ 85-1601e to 1645e (1978); LA. REV. STAT. ANN. §§ 9:1121-.1142 (West Supp. 1978); MD. REAL PROP. CODE ANN. §§ 11-101 to 128 (Supp. 1977); UTAH CODE ANN. §§ 57-8-3 to 36 (Supp. 1977); VA. CODE §§ 55-79.37 to .103 (Supp. 1978). In addition, the Council of State Governments has promulgated a Model Condominium Act and the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Condominium Act in August 1977, which was endorsed by the American Bar Association in Feb. 1978. For a comprehensive comparison of the Uniform Act and the amended Ohio statute, see *Condominiums*, REAL PROP. SECTION NEWSLETTER, OHIO ST. B.A. 1 (May 1978).

104. AM. SUB. H.B. 404, 112th Cong., Reg. Sess. (1977-78) (codified at OHIO REV. CODE ANN. §§ 5311.01-.09, .11, .13, .18, .21-.27 (Page Supp. 1978)).

105. *See id.* §§ 5311.24-.27. Other noteworthy provisions of the Act allow for condominium conversions, *id.* §§ 5311.01(X), .25(G), .26(G); further define the leasehold condominium concept and impose disclosure requirements, *id.* §§ 5311.01(W), .05(D); and provide increased protection to purchasers against destruction of a condominium by reason of foreclosure on mechanic's liens, which necessarily precede filing of the declaration, by providing that such liens are not enforceable against a good faith purchaser unless the affidavit of the mechanic's lien is filed for record before the unit deed or other instrument of conveyance is filed for record, *id.* § 5311.13(E), .13(F). *See generally* Blackburn & Melia, *Ohio Condominium Law Reform: A Comparative Critique*, 29 CASE W. RES. L. REV. 145 (1978).



clarifies certain ambiguities in the original scheme.<sup>106</sup> In addition, legislative sanction is given to phase development of condominiums through the creation of the legal classification of "expandable condominium property."<sup>107</sup>

### A. *The Declaration*

The Act delineates a detailed procedure whereby a developer may acquire the right to expand the condominium at a later date.<sup>108</sup> The developer must initially include in the declaration of

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106. One such ambiguity was whether a condominium may be built on noncontiguous parcels. See I P. ROHAN & M. RESKIN, *supra* note 26, § 16.03[1]. This question is resolved by § 5311.07, which provides that the drawings shall show the distances between any parcels if the condominium property is not contiguous. OHIO REV. CODE ANN. § 5311.07 (Page Supp. 1978).

107. The Act provides: "Expandable condominium property" means a condominium property the original declaration of which reserves the right to add additional property." OHIO REV. CODE ANN. § 5311.01(R) (Page Supp. 1978). "Additional property" is defined as "land or improvements described in the original declaration that may be added in the future to an expandable condominium." *Id.* § 5311.01(Q).

108. Section 5311.05(C) requires that in the case of an expandable condominium property, the declaration must contain:

(1) The explicit reservation of the declarant's option to expand the condominium property;

(2) A statement of any limitations on that option, including a statement as to whether the consent of any unit owners is required, and if so, a statement as to the method whereby the consent is to be ascertained; or a statement that there are no such limitations;

(3) A time limit, not exceeding seven years from the date the declaration is filed for record, renewable for an additional seven year period at the option of the developer, exercisable within six months prior to the expiration of the seven year period and with the consent of the majority of the unit owners other than the developer upon which the option to expand the condominium property will expire, together with a statement of any circumstances that will terminate the option prior to the expiration of the time limit;

(4) A legal description by metes and bounds of all additional property that, through exercise of the option, may be submitted to the provisions of this chapter and that, thereby, may be added to the condominium property;

(5) A statement as to whether all, or a particular portion, of the additional property must be added to the condominium property, or whether, if any additional property is added, all or a particular portion of the additional property must be added, and, if not, a statement of any limitations as to the portions that may be added or a statement that there are no such limitations;

(6) A statement as to whether portions of the additional property may be added to the condominium property at different times, together with any limitations fixing the boundaries of those portions by legal descriptions setting forth the metes and bounds of those portions, or regulating the order in which they may be added to the condominium property, or both;

(7) A statement of any limitations as to the location of any improvements that may be made on any portion of the additional property added to the condominium property, or a statement that there are no such limitations;

(8) A statement of the maximum number of units that may be created on the additional property. If portions of the additional property may be added to the condominium property and the boundaries of those portions are fixed in accordance with division (C)(6) of this section, the declaration shall also state the maxi-

the first phase an explicit reservation of the option to expand. Moreover, the developer must file an amendment to the declaration at the time of expansion.<sup>109</sup> This procedure obviates the need to obtain a power of attorney designation from first phase unit

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imum number of units that may be created on each portion added to the condominium property. If portions of the additional property may be added to the condominium property and the boundaries of those portions are not fixed in accordance with division (C)(6) of this section, the declaration shall also state the maximum number of units per acre that may be created on any portion added to the condominium property;

(9) Except in cases where the previously submitted condominium property contains no units restricted exclusively to residential use, a statement of the maximum percentage of the aggregate land and floor area of all units not restricted exclusively to residential use that may be created on any additional property or portions of additional property that may be added to the condominium property;

(10) A statement of the extent to which any structures erected on any portion of the additional property added to the condominium property will be compatible with structures on the submitted property in terms of quality of construction, the principal materials to be used, and architectural style, or a statement that the structures need not be compatible in those terms;

(11) With respect to all improvements to any portion of additional property added to the condominium property, other than structures, a statement setting forth both of the following:

(a) A description of the improvements that must be made or a statement that no other improvements must be made;

(b) Any restrictions or limitations upon the improvements that may be made or a statement that there are no restrictions or limitations upon improvements that may be made;

(12) With respect to all units created on any portion of additional property added to the condominium property, a statement setting forth both of the following:

(a) Whether all such units must be substantially identical to units on previously submitted land;

(b) Any limitations as to what types of units may be created on the additional property or a statement that there are no limitations;

(13) A description of the declarant's reserved right, if any, either to create limited common areas and facilities within any portion of the additional property added to the condominium property or to designate common areas and facilities within each portion that may subsequently be assigned as limited common areas and facilities, in terms of the types, sizes, and maximum number of such areas and facilities in each portion.

(14) Such drawings and plans as the declarant considers appropriate in supplementing the requirements of divisions (C)(4), (5), (6), (7), (10), (11), (12), and (13) of this section.

*Id.* § 5311.05(C).

109. The Act provides that:

In the case of an expandable condominium property, land and improvements on the property shall be considered added to the condominium property and submitted to the provisions of this chapter upon execution and filing for record by the declarant, including all of the owners and lessees of the land so added . . . of an amendment to the declaration, that contains the information, drawings, and plans . . . . The amendment . . . shall allocate and reallocate percentages of interest in the common areas and facilities of the condominium property appertaining to each unit of the condominium property. . . . [T]he execution and filing for record is an effective amendment of the declaration.

*Id.* § 5311.051. In addition, § 5311.06(A) provides: "Any amendment to the declaration by which any change is effected in the bylaws or drawings, including an amendment to add

purchasers and mortgagees. The Act, however, does not preclude a declarant from providing that multilateral consent must be obtained for expansion. The declaration must indicate whether there are any limitations on the option and include the method to be used to ascertain consent, if consent of any of the unit owners is required.

The option reserved by the developer must be exercised within seven years, and any circumstances which may cause early termination must be set forth. The option may be renewed for an additional seven-year period with the consent of a majority of unit owners other than the developer. The renewal right may be exercised within six months prior to the expiration of the original seven year period. The declaration must contain a metes and bounds description of all additional property that may be added, a statement of whether all or part of the additional property must be added, and a statement defining any limitations on portions that may be added. Further, the declaration must indicate whether portions of additional property may be added at different times. It must also disclose any limitations that fix the boundaries of the portions by metes and bounds or that regulate the order of additions to the condominium property.

The declaration must state the maximum number of units that may be built on additional land and the maximum number of units that may be built on any portions if all the additional property is not submitted simultaneously. If a legal description of the boundaries of the portions is not given, the declaration must express the maximum number of units that may be added per acre. The declaration must also set forth the maximum percentage of aggregate land and floor area of all units to be built on additional land that will not be restricted exclusively to residential use, except where the previously submitted condominium property contained no units restricted exclusively to residential use.

In addition, the declaration must indicate the extent to which the quality of construction, materials, and architectural style of structures to be added will be compatible with that of those on submitted property. Alternatively, a developer may retain total discretion as to compatibility by specifically stating that the structures need not be compatible in these terms. In regard to units created on additional property, the declaration must state whether

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additional land or an improvement to the condominium property, shall, when filed, have attached a true copy of the change in the bylaws or drawings."

these units are to be substantially identical to units on previously submitted land and whether there are any limitations on the types of additional units that may be constructed. Incorporated in the declaration must be a statement of any limitations regarding the location of any improvements that may be made on any portion of the additional property submitted. The declaration must also describe any improvements "other than structures" that are required to be made to any portion of additional property and any limitation on such improvements.

Moreover, the declaration must state any right reserved by the declarant either to create limited common areas within the additional property submitted or to designate common areas in additional property that could subsequently be designated as limited common areas. The types, sizes, and maximum number of any such areas and facilities must be fully described.<sup>110</sup> Finally, the Act provides that any supplemental drawings and plans that the declarant deems appropriate should be submitted with the declaration.

### B. *Variance With Former Standards*

A comparison of the standards which were recognized as a precondition to title insurance under the original Ohio statutory scheme and the procedure for phase construction under the Act reveals that essentially all the former are incorporated in some form into the latter.<sup>111</sup> The Act does not, however, require that initial phase unit owners be furnished with a copy of the amendments filed when additional property is submitted to a condominium.<sup>112</sup>

The most significant variance between the original standards and those embodied in the Act is that the former standards provided some assurance that later phase units would be of substantially the same type, character, style, quality, and size as those in the initial phase.<sup>113</sup> Under the recent legislation, it is possible for a developer to retain total discretion as to the quality, character,

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110. See note 42 *supra*. The Uniform Act provides for more detailed disclosure in this regard by requiring a statement of whether any new limited common areas will be of the same general type and size as those in other parts, and a statement of whether the proportion of limited common elements to units will be approximately equal to existing proportions. UNIFORM CONDOMINIUM ACT § 2-106(13), -106(14).

111. Compare note 85 *supra* and accompanying text with note 108 *supra*.

112. See note 108 *supra*.

113. See note 85 *supra*.

and architectural style of later phase structures, improvements, and units.<sup>114</sup> Thus, the new legislation may be subject to criticism on the ground that a developer may retain a *carte blanche* in regard to the compatibility of later phase construction.<sup>115</sup> The obvious problem is that cheaply constructed and poorly designed structures and units may be added—jeopardizing the resale value of prior phase unit owners and disturbing the aesthetic integrity of the project as a whole. Conversely, elaborate units and common facilities which are more expensive to maintain and insure may be added, increasing common expense assessments of initial phase purchasers.

Despite these potential ramifications, a survey of the statutes that allow expandable condominium development<sup>116</sup> reveals that such discretion is commonly permitted. Only one state expressly requires a developer to guarantee that any later phase construction will be of comparable quality, workmanship, and architectural style.<sup>117</sup> The explanation for this is that compatibility has been regarded as a factor of salability and not the subject of legal

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114. See OHIO REV. CODE ANN. §§ 5311.05(C)(10)–.05(C)(12) (Page Supp. 1978).

115. Conversation with Alvin W. Lasher, Branch Counsel, Lawyers Title Insurance Corp., Akron, Ohio (Jan. 30, 1978). The Department of Housing and Urban Development (HUD) has recently promulgated a Statement of Proposed Policies Relating to Condominium Documentation, 42 Fed. Reg. 4740 (1977), reprinted in 1 P. ROHAN & M. RESKIN, *supra* note 26, at 5 (Current Dev. Supp. May 1978). These proposed policies were the result of a task force study conducted by HUD, the Veteran's Administration, the Federal National Mortgage Association, and the Federal Home Loan Mortgage Corporation and would apply to projects financed totally or in part by any of these bodies. Section 5(a) of this statement enumerates those acts and rights reserved by a developer which usually would be deemed unacceptable. They include:

- (1) Reserving the right to include in the condominium adjoining land without adequate restrictions assuring that its future improvement will be of compatible style, quality, size and cost.
- (2) Retaining rights without adequate restrictions, to change the style, floor plan, size and quality of future buildings to be constructed as part of the condominium projects.

*Id.* at 4741, reprinted in 1 P. ROHAN & M. RESKIN, *supra* note 26, at 10 (Current Dev. Supp. May 1978).

116. See ARK. STAT. ANN. § 50–1024 (Supp. 1975); FLA. STAT. ANN. § 718.403 (West Supp. 1978); GA. CODE ANN. § 85–1625e (1978); KAN. STAT. ANN. § 58–3115b (1976); LA. REV. STAT. ANN. § 9:1124.2 (West Supp. 1978); MD. REAL PROP. CODE ANN. § 11–117 (Supp. 1977); MICH. COMP. LAWS ANN. § 599.132 (Supp. 1978); MO. ANN. STAT. § 448.030 (Vernon Cum. Supp. 1978); NEB. REV. STAT. § 76–812.01 (Supp. 1974); N.M. STAT. ANN. § 70–4–11.1 (Supp. 1975); OR. REV. STAT. § 91.509 (1977); S.C. CODE § 27–31–100(g) (1977); UTAH CODE ANN. § 57–8–13.6 (Supp. 1977); VA. CODE § 55–79.63 (Supp. 1978); UNIFORM CONDOMINIUM ACT § 2–106(9).

117. ARK. STAT. ANN. § 50–1024(e) (Supp. 1975) provides that with reference to any such additional buildings, the plans recorded with the Master Deed must reflect:

a covenant and warranty extending to each and all the owners of individual units or apartments in the regime that any construction would be of similar quality, in a

regulation. Thus, an awareness that there may not be guarantees as to the quality and compatibility of projected later phase units should be a factor in a prospective buyer's decisionmaking process.

A prospective buyer should also be cognizant that under the new legislation a developer need not guarantee that projected later phases will actually be added or that projected improvements to any portion of the additional property will ever be constructed. Thus, if elaborate common facilities have been constructed as part of the initial phase in anticipation of more units being built and occupied in later phases, an initial phase unit purchaser should be aware that there may be no reason to expect that additional units will be added and that his expense for maintaining these facilities will be proportionately diminished. Conversely, if recreational facilities have not been constructed during the initial phase, but are merely projected for later phases, a purchaser should understand that these facilities may never materialize.<sup>118</sup> Perhaps a more pressing problem in this regard is the overburdening of existing common facilities, which could occur if later phase units are constructed but projected later phase common facilities are not. This problem could be alleviated by requiring that the developer specify that a certain amount of common areas and facilities will be added with each phase.<sup>119</sup> Another solution would be to require the developer to post a surety bond or to establish an escrow fund that could be drawn upon by unit owners to construct common facilities should the developer fail to do so.<sup>120</sup>

The Act's failure to require developer guarantees in regard to compatibility and completion of common facilities epitomizes the general approach and the underlying philosophy of the amend-

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workmanlike manner in the same architectural style as the original buildings in the regime.

118. Of the complaints that have been voiced by condominium owners in the Columbus area, the greatest number relate to the failure of developers to construct proposed amenities, generally resulting from decisions by the developer not to proceed with additional phases. "Since such additional phases have often included promised recreation and other common facilities, some purchasers have felt 'cheated' by these failures to complete construction." II HUD CONDOMINIUM/COOPERATIVE STUDY app., at A-48 (1975).

119. See Blackburn & Melia, *supra* note 105, at 219.

120. Rosenstein, *supra* note 51, at 663. This suggestion is equally applicable to a nonexpandable condominium, as the new legislation only requires that the buildings be "constructed" at the time of filing the declaration. Section 5311.07 provides that: "In the case of any improvements, the drawings shall indicate which, if any, have been begun but have not been substantially completed by the use of the phrase '(NOT YET COMPLETED).'" OHIO REV. CODE ANN. § 5311.07 (Page Supp. 1978).

ments: retention of flexibility on the part of the developer, with consumer protection against uncertainties provided through disclosure.<sup>121</sup>

### C. Disclosure

Disclosure to prospective unit purchasers of expandable residential<sup>122</sup> condominium property is further promoted under the general disclosure provisions of the Act. Section 5311.26 requires that a prospective purchaser be furnished with a "readable and understandable written statement" which fully and accurately discloses "all material circumstances or features affecting the development" before a developer can sell or offer to sell a condominium ownership interest. This offering prospectus may not contain any untrue statement or intentionally omit any material facts.<sup>123</sup> The statement must include

[a] general narrative description of the development stating the total number of units, a description of the types of units and price of each type of unit, the total number of units that may be included in the development by reason of future expansion or merger of the development, and a precise statement of the nature of the condominium ownership interest that is being offered.<sup>124</sup>

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121. The Act provides that the written offering prospectus required to be furnished to each prospective purchaser, *see* text accompanying note 141 *infra*, must contain "[a] statement in twenty-point boldface type of the purchaser's right to review the condominium instruments . . ." OHIO REV. CODE ANN. § 5311.26(J) (Page Supp. 1978).

122. The Act expressly excludes the application of the general consumer protection and disclosure provisions to "the sale of a condominium ownership interest solely to commercial or industrial purposes or uses." *Id.* § 5311.24(A).

123. *Id.* § 5311.26.

124. *Id.* § 5311.26(B). The written offering prospectus must also include the name and address of the development, developer, and development manager or agent, *id.* § 5311.26(A); a general disclosure of the status of the construction, including compliance with applicable regulations and scheduled dates of construction completion, *id.* § 5311.26(C); the significant terms of any financing offered to purchasers by or through the developer, *id.* § 5311.26(D); a description of mandatory warranties, *id.* § 5311.26(E); a two-year projection of annual expenditures with a complete statement of estimated monthly cost per unit, including the formula for determining each unit's share of common expenses; the amount of taxes and insurance and the basis or formula used in arriving at these amounts; and the amount of operating, maintenance, utility, and other expenses, *id.* § 5311.26(F); a statement of provisions for management of the condominium, including formation and operation of the unit owners association, *id.* § 5311.26(H); facsimiles of any management contracts, *id.* § 5311.26(I); the existence or requirement for the establishment of a reserve fund to repair or replace damaged common areas, *id.* § 5311.26(K); significant terms of any encumbrances, easements, liens, and matters of title affecting the development, *id.* § 5311.26(L); a statement of the requirement for escrow of deposits, *id.* § 5311.26(M); a statement of any restraints in free alienability, *id.* § 5311.26(N); and a statement describing any present litigation concerning the development, *id.* § 5311.26(O).

There are several ambiguities in this section. First, it is unclear whether the requisite description must indicate the price of the types of units that may be included in future expansion. Reading the section to require the inclusion of such price information would appear to be inappropriate, since such a requirement would contravene one of the primary purposes of allowing progressive construction of condominiums—providing developers with some measure of flexibility to alter unit mix and price in later phases in accordance with market demands. Second, the drafter's use of the phrase "or merger" is confusing because this term does not appear in the provisions dealing with expandable condominium property.<sup>125</sup> Finally, there is some ambiguity as to what will satisfy the requirement of a "precise statement of the nature of the condominium ownership interest." While this provision primarily contemplates disclosing whether a purchaser is receiving a fee as opposed to a leasehold estate,<sup>126</sup> it may be advisable to also spell out the future interest that initial phase owners have in subsequent phases.<sup>127</sup>

In addition, the general consumer protection measures are made expressly applicable to all residential condominium ownership interests added to condominium property through the filing of an amendment to a declaration on or after the effective date of the Act.<sup>128</sup> Thus, a developer must comply with all the general consumer protection measures of the Act in regard to later phase purchasers even when additional property is submitted through an amendment by a developer pursuant to a power of attorney<sup>129</sup> which predates the establishment of the statutory procedure for expanding condominiums. In this sense, the Act does have some retrospective application.<sup>130</sup>

The Act also sets out how certain consumer protection provisions will operate in regard to expandable condominiums. The Act establishes a timetable for the unit owners other than the de-

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125. The phrase does not refer to the creation of larger units through the combination of existing units, *see* note 174 *infra* and accompanying text, because this is sanctioned by the Act only in nonresidential developments, while the Act's consumer disclosure provisions apply only to residential condominiums. *See* note 122 *supra*.

126. *See* OHIO REV. CODE ANN. § 5311.01(M) (Page Supp. 1978) (defining "condominium ownership interest" as "a fee simple estate or a ninety-nine year leasehold estate, renewable forever, in a unit, together with an appurtenant undivided interest in the common areas and facilities.").

127. *See* notes 61–63 *supra* and accompanying text.

128. OHIO REV. CODE ANN. § 5311.241 (Page Supp. 1978).

129. *See* note 60 *supra* and accompanying text.

130. *See* text accompanying note 23 *supra*.



veloper to assume control of the unit owners association. Generally, when units to which twenty-five per cent of the interests in common areas appertain have been sold and conveyed to good faith purchasers, unit owners must elect at least twenty-five percent of the members of the board of managers.<sup>131</sup> When interests equaling fifty percent have been sold and conveyed, unit owners must elect at least one-third of the members of the board of managers.<sup>132</sup> However, in computing percentages for these purposes in an expandable condominium, the Act expressly provides that the percentage is to be computed by comparing the number of units sold to the maximum number of units that may be created, as stated in the declaration of the expandable condominium property.<sup>133</sup> The problem with this formula is that it allows a developer to retain control of the unit owners association for an increased length of time by merely projecting the construction of subsequent phases. Moreover, the Act extends the maximum time that a developer may appoint and remove board members and officers<sup>134</sup>—and thus retain control of the unit owners association—to five years in an expandable condominium as opposed to three years in a nonexpandable condominium.<sup>135</sup>

The Act requires that the developer provide a two-year warranty for repair and replacement of structures and common utility elements necessitated by defects in material or workmanship.<sup>136</sup> A one-year warranty similarly must be provided for elements pertaining to individual units.<sup>137</sup> In a nonexpandable condominium, the warranties "commence on the date the deed or other evidence of ownership is filed for record following the first sale of a condominium ownership interest to a purchaser in good faith for value."<sup>138</sup> The Act makes an express qualification in regard to expandable condominiums: the two-year warranty commences for the first phase after the filing of the first sale in that phase, but the two-year warranty for elements in an additional phase does not commence until the first sale of an interest in *that* phase.<sup>139</sup> Curi-

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131. OHIO REV. CODE ANN. § 5311.08(C) (Page Supp. 1978).

132. *Id.*

133. *Id.*

134. *Id.* § 5311.08(D).

135. *Id.* § 5311.08(D)(1). However, this control must be relinquished 30 days after the sale of units to which 75% of the percentage interests appertain, should this occur earlier.

136. *Id.* § 5311.25(E).

137. *Id.*

138. *Id.* § 5311.25(E)(1).

139. *Id.* § 5311.25(E)(2).

ously, the Act fails to make the same qualification in regard to the one-year warranty. Thus, for all practical purposes, the period of the one-year warranty will have elapsed before the construction or conveyance of later phase units.<sup>140</sup>

#### D. *Reallocation and Assignment of Percentage Interests*

An aforementioned restraint on phase development under the original Ohio statutory scheme was the requirement that percentage interests in common areas could not be altered without the unanimous consent of all unit owners.<sup>141</sup> In contrast, under the Act, a developer may add land and improvements, and unilaterally allocate percentage interests to later phase unit purchasers and reallocate percentage interests of original phase unit owners by filing an amendment to the declaration.<sup>142</sup> The Act requires that the interest of units previously submitted be reallocated uniformly.<sup>143</sup> Thus, the ratio between the interests held by original unit owners remains static. Where real estate tax liability is determined through an overall assessment method, initial phase unit tax bills will remain proportionately the same.<sup>144</sup>

In regard to the assignment of percentage interests generally, the Act increases a developer's options by providing that in a nonexpandable condominium, "the interest shall be computed in the proportion that the fair market value of the unit bears to the aggregate fair market value of all units on the date the declaration is originally filed for record *or* shall be based on the size *or* par value of the unit."<sup>145</sup> Par value is defined as a number expressed in dollars or in points which need not reflect or relate to sale price or fair market value. Thus, the basis of apportioning interests in common elements need not be tied to some notion of actual value.<sup>146</sup> In regard to expandable condominiums, however, the

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140. Lecture by Marvin S. Zelman, delivered at Case Western Reserve University School of Law, Cleveland, Ohio (Nov. 7, 1978).

141. See note 17 *supra* and accompanying text.

142. OHIO REV. CODE ANN. § 5311.051 (Page Supp. 1978).

143. *Id.* § 5311.07(B).

144. See note 75 *supra* and accompanying text.

145. OHIO REV. CODE ANN. § 5311.07(B) (Page Supp. 1978) (emphasis added). The addition of the term "fair market value" is probably designed to clarify the meaning and mandate of the term "fair value" in the original statute. See note 16 *supra*. Although the Act does not further define the term "size," presumably percentage interests can be allocated on the basis of area or volume.

146. The Act defines par value as "a number expressed in dollar or points attached to a unit by the declaration." OHIO REV. CODE ANN. § 5311.01(Y) (Page Supp. 1978). "If par value is stated in terms of dollars, it need not reflect or relate in any way to the sale price or

Act sets certain restrictions as to the manner in which these methods may be employed. The interest in common areas in expandable condominiums may be allocated in any proportion or on any basis so long as the proportion or basis is the same for original and subsequent phase units.<sup>147</sup> This is subject to the qualification that par value may not be used unless the declaration either requires that all original and later phase units be substantially identical or describes the types of projected later phase units and the par values which will be assigned.<sup>148</sup> At most, these qualifications will prevent a developer from effecting an inequitable reallocation through the assignment of par value, and at a minimum they will apprise initial phase purchasers of a developer's retained options.

At first blush, it appears that employing the fair market value as a method of allocation and reallocation of percentage interests in an expandable condominium could lead to undesirable results. Because of the rise in the cost of materials and labor, and general inflationary trends, later phase units would probably have a greater market value and thus receive a greater percentage interest in the common areas. Clearly this is not the intent of the statute. There are two possible interpretations that would avoid this result. Under the first, the calculation could be made using an estimate of what the fair market value of the later units would have been had they been included originally. Alternatively, the fair market value of initial and later phase units at the date of amendment could be used. It is unclear, however, which of these methods is mandated by the Act.

### E. *Inward Expansion and Other Concepts*

The Act does not specifically incorporate certain concepts which have been adopted by other states to provide a developer with increased flexibility to construct condominiums progres-

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fair market value of any unit, and no opinion, appraisal, or market transaction at a different figure affects the par value of any unit." *Id.* § 5311.04(B).

It would appear that a developer, by employing the par value concept, could create a totally egalitarian condominium. Regardless of unit value, all unit owners would have an equal interest in the common elements and share common expenses equally. This could raise problems, however, where real estate tax liability is determined through an overall assessment method. See note 75 *supra* and accompanying text.

147. OHIO REV. CODE ANN. § 5311.04(B) (Page Supp. 1978).

148. *Id.* § 5311.04(C). "Substantially identical units shall be assigned the same par value, but units located at substantially different heights above the ground, or having substantially different views, amenities or other characteristics that might result in differences in fair market value may, but need not be considered substantially identical." *Id.* § 5311.04(B).

sively. These include "convertible land,"<sup>149</sup> "contractable condominium,"<sup>150</sup> and "convertible space."<sup>151</sup>

### 1. *Convertible Land*

Stated simply, convertible land is condominium land on which the developer intends to build units which have not been constructed at the time of recordation of the condominium instrumentation.<sup>152</sup> Title to convertible land is held by original unit owners as a common element. This title, however, is subject to the developer's reserved option, limited in time, to build additional units on the land and to reallocate percentage interests accordingly. Thus, the developer retains a beneficial interest for the period of his option, and any expenses attributable to the convertible land are paid by the developer. In certain situations, the convertible land concept can have advantages over the "additional property" concept, especially in regard to describing additional construction and designating easements.<sup>153</sup>

Although under the language of the Act there is no explicit recognition of the convertible land concept, it is arguable that it is implicitly recognized and that additional units can be constructed on land already submitted to the condominium regime. The basis for this argument is that the Act defines "additional property" as "land *or improvements* described in the original declaration that

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149. *E.g.*, KAN. STAT. § 58-3115a (1976); VA. CODE § 55-79.61 (Supp. 1978).

150. *E.g.*, GA. CODE ANN. § 85-1631e (1978); VA. CODE § 55-79.64 (Supp. 1978).

151. *E.g.*, GA. CODE ANN. § 85-1624e (1978); VA. CODE § 55-79.62 (Supp. 1978).

152. *See* VA. REPORT, *supra* note 94, at 5; Johnakin, *supra* note 16, at 2, 4; Rosenstein, *supra* note 51, at 664 n.20; Comment, *Condominiums in Virginia—The Condominium Act of 1974*, 9 U. RICH. L. REV. 135, 141 (1974).

153. The Uniform Act provides the following example:

For example, suppose the declarant is developing a condominium project eventually to consist of 100 units in two 50-unit buildings, with one underground garage lying beneath both buildings to serve all 100 units. The entire garage and only one building will be completed first. The simplest way of creating the condominium may be to include all of the real estate which will constitute the condominium, and to designate the location of the second building and the garage as convertible real estate. The 50 units in the first building could then be conveyed after they are completed, together with any limited common element parking spaces to be assigned to those units by converting a portion of the convertible real estate in the underground garage into limited common elements. This could be done before the second building (also in convertible real estate) is completed and converted into 50 more units. However, the entire parcel of real estate would be part of the condominium from the beginning.

Two advantages of convertible real estate over additional real estate in this example would be that no horizontal metes and bounds description would be required to divide the second building from the remainder of the condominium, and no special easements over the convertible real estate benefitting the units in the first building would be required.

UNIFORM CONDOMINIUM ACT § 1-103, comment 6.

may be added in the future to an expandable condominium property.”<sup>154</sup> “Expandable condominium property” is in turn defined merely as “a condominium property the original declaration of which reserves the right to add additional property [land or improvements].”<sup>155</sup> Thus, if a unit is considered to be an improvement, it is arguable that additional units could be constructed without additional land being submitted. Since the Act fails to define “improvements” it is not clear whether the terms “improvements” and “units” overlap or are mutually exclusive.

The ambiguity of the meaning of the term “improvements” cannot be resolved totally by an examination of other provisions of the Act which employ this term. The Act defines “condominium property” as “land, all buildings, improvements, and structures on the land . . . submitted to the provisions of this Chapter.”<sup>156</sup> The separate listing of these terms apparently implies that each has some independent significance. However, section 5311.05(C), which delineates the information that must be included in the declaration of an expandable condominium property, requires different assurances or nonassurances depending on whether a developer is adding structures,<sup>157</sup> improvements other than structures,<sup>158</sup> or units.<sup>159</sup> While these provisions clearly imply that the term “structure” is a subset of the category “improve-

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154. OHIO REV. CODE ANN. § 5311.01(Q) (Page Supp. 1978) (emphasis added).

155. *Id.* § 5311.01(R). The drafters of the Act did not intend by their definition of additional property to imply that additional units could be constructed on previously submitted land. They did, however, contemplate the addition of improvements in the sense of the subsequent construction by the developer of recreational facilities such as a swimming pool or tennis court on previously submitted land. Conversation with Arthur V. N. Brooks, State Representative and drafter of Am. Sub. H.B. 404 (Sept. 18, 1978). The delay of construction of certain “discretionary” common recreational facilities may be a good business practice, since it affords the unit purchasers an opportunity to express their choice of amenities.

This ambiguity would not have arisen under the language of H.B. 1355, the unsuccessful precursor of Am. Sub. H.B. 404, which defined “expandable condominium property” as “a condominium property not submitted to the provisions of the Revised Code on condominiums at the filing of the declaration, the declaration of which declares, however, that additional land may be added.” “Additional land” was in turn defined as “land described in the declaration as land that may be added, including structures and improvements on the land and easements, rights, and appurtenances, including personal property belonging to the land.” Legislative Service Commission Research Memorandum R-3912, at 15 (Feb. 9, 1977).

156. OHIO REV. CODE ANN. § 5311.01(A) (Page Supp. 1978).

157. *See id.* § 5311.05(C)(10). *See* note 108 *supra*.

158. *See* OHIO REV. CODE ANN. § 5311.05(C)(11) (Page Supp. 1978). *See* note 108 *supra*.

159. *See* OHIO REV. CODE ANN. § 5311.05(C)(12) (Page Supp. 1978). *See* note 108 *supra*.

ments," the provisions also lend support for the proposition that the things contemplated by the terms "improvements" and "units" are divergent.<sup>160</sup>

Some light may be shed on the ambiguity by considering section 5311.07 which provides that the drawings shall show "all the particulars of the land, buildings, and other improvements."<sup>161</sup> The use of the word "other" implies that a building (which may be composed of units)<sup>162</sup> *is* an improvement. Nevertheless, the final provision of this section which requires that "[i]n the case of any improvements, the drawings shall indicate which, if any, have been begun but have not been substantially completed . . .,"<sup>163</sup> lends strong support for the proposition that a unit, which by definition must be part of a building, *is not* an improvement because the section retains the requirement that "the drawings accurately show the building or buildings as constructed."<sup>164</sup>

It can be conclusively stated, however, that after control of the condominium development is assumed by the unit owners association, inward expansion in the sense of the construction of additional units on land previously submitted would be impossible. Section 5311.25 requires that "[e]xcept in his capacity as a unit owner of unsold condominium interests, the developer or agent will not retain a property interest in any common areas and facilities after control of the condominium development is assumed by the unit owners association."<sup>165</sup> Thus, a developer could not re-

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160. Compare OHIO REV. CODE ANN. § 5311.05(C)(11) (Page Supp. 1978) with *id.* § 5311.05(C)(12).

161. *Id.* § 5311.07.

162. While the Act provides that a unit must be part of a building there is no definitional requirement that a building must be comprised of units.

163. OHIO REV. CODE ANN. § 5311.07 (Page Supp. 1978).

164. *Id.* An interpretation of the Act as not allowing inward expansion would comport with the holding in *Grimes v. Moreland*, 41 Ohio Misc. 69, 322 N.E.2d 699 (C.P. Franklin County 1974). See note 51 *supra*. In *Grimes*, the court held that unit owners' placement of fences and air condition compressors on condominium common areas was not a "use" of property requiring approval of the owners' association board and compliance with provisions of the declaration, amended by the 75% vote of unit owners under § 5311.05(9). Rather, it was considered a "taking" of common area property affecting the percentage of undivided interest of other unit owners requiring unanimous approval of an amended declaration under § 5311.04(C). Analogizing to the holding in *Grimes*, the subsequent construction of units on land designated as common areas of an initial phase would constitute a taking of common area property affecting the percentage of undivided interest, and would require unanimous approval of an amended declaration. Thus, the submission of these units to the condominium regime through an amendment executed by the developer—the means sanctioned by the Act for the addition of property—would not be possible under *Grimes*.

165. OHIO REV. CODE ANN. § 5311.25(B) (Page Supp. 1978).

tain any interest in the common areas to convey to purchasers of units subsequently constructed on previously submitted land.

## 2. *Contractable Condominium*

The contractable condominium concept is generally used in conjunction with the convertible land concept and is essentially the converse of an expandable condominium. In a contractable condominium, a developer designates certain parcels of land submitted under the declaration as "withdrawable land," subject to the developer's reserved right, limited in time, to withdraw that land from the condominium regime by filing a subsequent amendment.<sup>166</sup> The contractable method not only provides increased flexibility for the developer, but also protects construction lenders. A mortgage lender who acquires the property through foreclosure has the option to take out withdrawable land.<sup>167</sup> This method also benefits unit purchasers: if the entire project has not been completed in accordance with the original plans, title to units would otherwise be unmarketable since the rights and responsibilities concerning payment of common expenses would be unclear.<sup>168</sup> Nevertheless, a drawback to the contractable method is that failure to follow the requisite procedures for withdrawal could lead to permanent loss of the unused portion of the property to the condominium. By contrast, an unsuccessful attempt to add a phase to a preexisting condominium still leaves a developer the option to construct a second, separate, parallel condominium.<sup>169</sup>

It is clear that the use of the "convertible land" and "contractable condominium" concepts would provide additional flexibility to a developer in planning and marketing various condominium developments. The drafters of the Act, however, chose not to incorporate these additional methods on the rationale that the expandable condominium concept would provide sufficient flexibility; they apparently eschewed these additional methods as fostering additional fluctuations which could lead to further uncertainties to a unit purchaser.<sup>170</sup> In this sense the amendments

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166. See VA. REPORT, *supra* note 94, at 6; Johnakin, *supra* note 16, at 14; Rosenstein, *supra* note 51, at 664 n.20; Comment, *supra* note 152, at 141-42.

167. Comment, *supra* note 152, at 141; see VA. REPORT, *supra* note 94, at 6.

168. VA. REPORT, *supra* note 94, at 6.

169. Fegan, *supra* note 74, at 810 n.20 (1974).

170. Conversation with Arthur V.N. Brooks, *supra* note 155. The Act does not incorporate additional and elaborate methods for expansion and withdrawal in part because the primary impetus behind the revision of chapter 5311 was the desire to enact extensive consumer protection provisions. Thus, the amending legislation was drafted primarily from

reflect a degree of conservatism on the part of the drafters.<sup>171</sup>

### 3. *Convertible Space*

The Act also does not incorporate the "convertible space" concept. A convertible space is simply an area within a building which may be converted into one or more units or common area after the condominium instrumentation has been filed.<sup>172</sup> This concept has the greatest utility in commercial, industrial, and office condominiums where a developer is apt to have more difficulty in predicting the space requirements of a unit purchaser.<sup>173</sup> However, a corollary of the convertible space concept has been incorporated, albeit narrowly, into the Act through a provision allowing that units in nonresidential projects may, to the extent provided in the declaration, be combined or divided.<sup>174</sup> This idea has generally come to be known as "flexible boundaries."<sup>175</sup> There is one major difference between the convertible space concept and the flexible boundaries concept. Under the former, common areas may be created out of what was originally a unit owned by the

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the standpoint of what would benefit the purchaser. Moreover, the drafters did not detect a strong public interest for the inclusion of further methods. *Id.*

171. This conservatism is also apparent in that the Act retains the original definition of a unit, whereas other states have eschewed the "part of a building" definition for a more flexible approach which does not require that a unit consist of enclosed space. *See, e.g.,* VA. CODE § 55-79.41(y) (Supp. 1978) (defining unit as merely "a portion of the condominium designed and intended for individual ownership and use").

172. VA. REPORT, *supra* note 94, at 8 ("Whereas a Convertible Land is treated as a portion of the common elements until it is 'converted,' an unconverted Convertible Space is treated as though it were a unit owned by the developer.").

173. *Id.* at 7. There is some evidence, however, that the convertible space idea has actually been used in Ohio through "the condominium of the whole plan." *See* II HUD CONDOMINIUM/COOPERATIVE STUDY app., at A-44 (1975). This approach was developed to avoid the statutory restraints on phase development and involved designation of the entire undeveloped area of the project as a single unit, with the appurtenant percentage interests assigned to the developer as a unit owner. This single unit could then be subsequently divided without affecting the original purchasers' percentage interests in common areas. *Id.*

174. OHIO REV. CODE ANN. § 5311.03(G) (Page Supp. 1978) provides:

To the extent provided in a declaration and subject to conditions it imposes, a unit in a condominium property other than a condominium development may be divided into two or more units, or all or part of a unit may be combined with all or part of one or more other units. Such a division or combination shall require an amendment to the declaration accompanied by drawings showing all particulars of the division or combination . . . . The amendment shall specify the percentage interest in the common areas and facilities, the proportionate share of common surplus and common expenses, and the voting power of the unit or units resulting from the division or combination, the total of which, in each case, shall equal the interest, share, and power of the former unit or units divided or combined.

175. Comment, *Missouri's Condominium Property Act: Time for a Change*, 42 MO. L. REV. 271, 276 (1977).



developer, while the latter approach contemplates only the division or combination of existing units. Thus, under the flexible boundaries method the amount of common area remains fixed. The Act is unclear as to who is required to execute the amendment which facilitates the division or combination. There are three possible interpretations: (1) it may be done unilaterally by the developer; (2) it requires the consent of the unit owners affected; or (3) it calls for unanimous approval by all unit owners. Conceivably, approval may be effected by any of these methods as long as it is provided for in the original declaration.

#### F. Easements

The Act facilitates the planning and marketing of an expandable condominium through the inclusion of two provisions dealing with easements. The provision under the original statute requiring that each unit have a direct exit to a public street or highway or to a common area leading to a public street or highway<sup>176</sup> is extended by the Act to provide "that units in an expandable condominium property may have a direct exit to a permanent easement leading to a public street or highway across additional property identified in the declaration."<sup>177</sup> This language, however, applies only to expandable condominiums as defined under the amendments. Thus, it does not solve the problem of whether, in a nonexpandable or two-tier project, units can have a direct exit to a public street or highway through a permanent easement.<sup>178</sup> It is at least arguable that the recent amendments, by negative implication, support the conclusion that an exit through a permanent easement would not fulfill the statutory mandate. There is a general consensus among title insurance companies in Ohio, however, that a condominium unit with an exit through a permanent easement is an insurable interest.<sup>179</sup>

Second, in order to facilitate the sale of later phase units, a qualified exception is made in the case of an expandable condominium to the provision prohibiting a developer from retaining a property interest in any of the common areas after unit owners other than the developer have assumed control of the unit owners association.<sup>180</sup> Thus, a developer may retain an interest that

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176. OHIO REV. CODE ANN. § 5311.03(C) (Page 1970).

177. *Id.* § 5311.03(C) (Page Supp. 1978).

178. See note 102 *supra*.

179. Lecture by Marvin S. Zelman, *supra* note 140.

180. OHIO REV. CODE ANN. § 5311.25(B) (Page Supp. 1978).

serves to allow ingress and egress to common areas by prospective unit owners in additional property.<sup>181</sup>

#### IV. CONCLUSION

In drafting the amendments to the Ohio condominium statute, the legislators attempted to balance the interests of developers and purchasers. The new procedure outlined for expansion of condominiums is intended to provide developers with a degree of flexibility. At the same time, the disclosure requirements are meant to protect purchasers against the pitfalls in progressive construction. Inherent in this balance, however, are disadvantages to the purchaser and developer.

Although the original statutory restraints on phase development may only have been a function of the peculiar historical development of the condominium concept,<sup>182</sup> it cannot be gainsaid that the provisions which, in effect, required completion of the condominium project before the conveyance of title to any units<sup>183</sup> served an important function in protecting a unit purchaser. Such provisions guaranteed that construction would be completed, and informed the purchaser of both the size of the condominium and his fixed percentage interest in common areas and facilities. Under the new provisions, a unit purchaser suffers a detriment to the extent that percentage interests may shift and later phase units may not be compatible in quality or style with the existing units.

On the other hand, the new legislation curtails the unchecked discretion in expanding a condominium that a developer could retain using common law concepts. The recent amendments prohibit certain action on the part of a developer and require disclosure of a developer's retained options, through the declaration and offering statement. Thus, to the extent that a developer must divulge the nature of his projected plans for subsequent stages, he relinquishes some flexibility. Further, strict compliance with the general disclosure provision of the Act may impose an onerous burden on developers and, in some instances, serve as a disincentive to future development. The value of the disclosure requirements is premised on the fact that a prospective purchaser will be apprised to the full extent of a developer's retained options and that this knowledge will enable him to make an informed decision on whether to buy.

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181. *Id.*

182. See notes 24-34 *supra* and accompanying text.

183. See notes 14-18 *supra* and accompanying text.

Although not sanctioned under the original Ohio statute, progressive construction of condominiums has taken place in this state. Attempts to employ traditional building and marketing techniques in the unique field of condominium development gave rise to various methods of circumventing the original statutory restraints on phase development. As one commentator has stated, "expandable condominiums have been created throughout the United States, despite express statutory sanction, because the 'expandable' is such an eminently practical way of developing a condominium in situations where the developer is unable to predict at the outset how large the project may grow."<sup>184</sup> The benefits for a developer in terms of capital investment and cash flow are obvious. Despite inherent uncertainties, especially in regard to marketability of title, units in progressively constructed condominiums have found acceptability in the marketplace. Thus, notwithstanding certain ambiguities in the language and in the practical application of the Act, the passage of legislation which sanctions a specific method for progressive construction and provides affirmative statutory control over expandable condominiums must be regarded as beneficial.

JOHN S. INGLIS

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184. Johnakin, *supra* note 16, at 14.